

89-801

No.

Supreme Court, U.S.

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JOSEPH F. SPANIOLO, JR.
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1989

CONSUMER VALUE STORES,

Petitioner

v.

BOARD OF PHARMACY OF NEW JERSEY,

Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF NEW JERSEY

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QUESTIONS PRESENTED

1. Whether a state may promulgate a statute which fails to provide any definitions of the specific terms incorporated within the statute (in this case "discount," "rebate" or "premium") and which otherwise fails to provide adequate notice to individuals to inform those subjected to action thereunder as to conduct which will render them liable to its penalties and subject them to a loss of property therefore flawing the statute as void for vagueness under the Fourteenth Amendment to the United States Constitution.

2. Whether a state may validly enact "price control" legislation which vitiates a professional's unrestrained right to effectively compete freely in the marketplace.

3. Whether a State Agency's failure to promulgate rules and regulations pursuant to a state statute, whereby an individual would be able to ascertain whether particular conduct is prohibited under the statute,

(a) precludes the agency from later proceeding by adjudication to enforce the statute, and

(b) constitutes an unconstitutional deprivation of an individual's Substantive Due Process Rights as guaranteed by the Fourteenth Amendment to the United States Constitution.

4. Whether a statute that effectively permits the circumvention of the constitutional rights of some members of a professional group by allowing others to compete with unfair advantage in the marketplace, purposely promotes economic protectionism in violation of the United States Constitution.

5. Whether a state, through the mechanics of a statute which permits discounts, rebates and premiums for prescription drugs only for individuals age 62 or older,

a. may inversely discriminate against individuals under the age of 62, who, by compulsion are required to

subsidize such a program for which they receive no benefit; and

b. whether said inverse discrimination violates the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.

PARTIES TO THE PROCEEDING

The parties to the proceeding in the Supreme Court of the State of New Jersey whose judgment is sought to be reviewed are:

1. Consumer Value Stores, a Division of the Melville Corporation (the interests of Timothy Brophy are represented by CVS, his employer at the time the within cause arose).

2. The Board of Pharmacy of the State of New Jersey.

TABLE OF CONTENTS

QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING	iii
TABLE OF CONTENTS	iv
TABLE OF AUTHORITIES	vi
OPINIONS	x
JURISDICTION	1
CONSTITUTIONAL PROVISIONS & STATUTES INVOLVED	1
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	7
1. The decision of the New Jersey Supreme Court, involving numerous substantial federal questions which affect the public health, safety and welfare, necessitates a thorough examination by this Court ...	7
2. The New Jersey Supreme Court improperly held that an administrative agency can proceed by adjudication rather than rulemaking where there is no statutorily defined conduct which is prohibited. Therefore, the action of the New Jersey Supreme Court is contrary to the Due Process principles set forth in the United States Constitution	9
3. A significant constitutional issue exists where a State Supreme Court upholds the constitutionality of a State Statute in which the statute fails to define specific terms relating to the prohibited conduct and does not give adequate notice of the prohibited conduct to the class of persons regulated by the statute	11

4. A State Legislature may not enact price control statutes which effectively constitute economic protectionism of one group over another where the enactment is neither in the public interest nor rationally related to any legitimate state purpose	15
5. The decision below is contrary to principles of the Equal Protection Clause of the United States Constitution by failing to establish a rational basis for the distinction between individuals age 62 and older and those individuals under age 62	18
CONCLUSION	22

TABLE OF AUTHORITIES

<i>Ashton v. Kentucky</i> , 384 U.S. 195 (1966)	12
<i>City of New Orleans v. Dukes</i> , 427 U.S. 297 (1976)	16
<i>Coates v. Cincinnati</i> , 402 U.S. 611 (1971)	12
<i>Connally v. General Construction Co.</i> , 269 U.S. 385 (1926)	12
<i>Cramp v. Board of Public Instruction</i> , 368 U.S. 278 (1961)	12
<i>Eisenstadt v. Baird</i> , 405 U.S. 438 (1972)	20
<i>Giaccio v. Pennsylvania</i> , 382 U.S. 399 (1966)	13
<i>Graham v. Richardson</i> , 403 U.S. 365 (1970)	19
<i>Grayned v. City of Rockford</i> , 408 U.S. 104 (1971)	12
<i>Gregory v. Chicago</i> , 394 U.S. 111 (1969)	12
<i>Herndon v. Lowry</i> , 301 U.S. 242 (1937)	13
<i>In the Matter of CVS Pharmacy, Wayne</i> , 224 N.J. Super. 631, 541 A.2d 242 (App. Div. 1988)	3, 4, 9, 13, 17
<i>International Harvester Co. v. Kentucky</i> , 234 U.S. 216 (1914)	12
<i>Interstate Circuit v. Dallas</i> , 390 U.S. 676 (1968)	12
<i>Jordan v. De George</i> , 341 U.S. 223 (1951)	12
<i>Kunz v. New York</i> , 340 U.S. 290 (1951)	13
<i>Lanzetta v. New Jersey</i> , 306 U.S. 451 (1939)	12
<i>Lehr v. Robertson</i> , 463 U.S. 248 (1983)	21
<i>McLaughlin, et al. v. Florida</i> , 379 U.S. 184 (1964)	19
<i>Mississippi University for Women, et al. v. Hogan</i> , 458 U.S. 718 (1982)	19
<i>New York City Transit Authority v. Beazer</i> , 440 U.S. 568 (1979)	19
<i>Papachristou v. City of Jacksonville</i> , 405 U.S. 156 (1972)	12
<i>Pennell v. San Jose</i> , 485 U.S. 1 (1988)	16

TABLE OF AUTHORITIES (Continued)

<i>Police Department of Chicago v. Mosley</i> , 408 U.S. 92 (1972)	20
<i>Reed v. Reed</i> , 404 U.S. 71 (1971)	21
<i>Saia v. New York</i> , 334 U.S. 558 (1948)	13
<i>SEC v. Chenery</i> , 332 U.S. 194 (1947)	11
<i>Shuttlesworth v. Birmingham</i> , 382 U.S. 87 (1965)	13
<i>State Department of Environmental Protection v. Stavola</i> , 103 N.J. 425, 511 A.2d 622 (1982)	11
<i>Thornhill v. Alabama</i> , 310 U.S. 88 (1940)	13
<i>United States v. Cohen Grocery Co.</i> , 255 U.S. 81 (1921)	12
<i>United States v. Harriss</i> , 347 U.S. 612 (1954)	12
<i>Weinberger v. Wiesenfeld</i> , 420 U.S. 636 (1975)	20

CONSTITUTIONAL PROVISIONS CITED:

United States Constitution, Amendment 14	2
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STATUTES CITED:

28 U.S.C. 1257(3)	1
N.J. Stat. Ann. 45:14-12	1, 13
N.J. Stat. Ann. 45:14-12(f)	1, 2, 3, 6, 10, 11, 15-17
N.J. Stat. Ann. 45:14-12(g)	1, 10
N.J. Admin. Code tit. 13:39-9.13	9, 15

APPENDICES

Opinion of the Superior Court of New Jersey, Appellate Division, dated April 28, 1988	23
Opinion of the Supreme Court of the State of New Jersey, dated August 14, 1989	31

APPENDICES (Continued)

Final Order and Decision of the State Board of Pharmacy, dated February 5, 1987	45
Order on Emergent Application for a Stay, dat- ed September 15, 1989	48
Order of the Supreme Court of the State of New Jersey denying application for Stay, dat- ed September 19, 1989	49
Order of the Supreme Court of the United States, dated October 2, 1989	50
Order of the Supreme Court of the United States, dated October 16, 1989	51
Order of the Superior Court of the State of New Jersey, Appellate Division granting Crossmotion to strike Motion for Stay, dated July 11, 1989	52
Order of the Superior Court of the State of New Jersey, Appellate Division denying Mo- tion for Stay, dated July 11, 1989	53
Order of the Supreme Court of the State of New Jersey granting Leave to file Stay, dated July 24, 1988	54
Order of the Supreme Court of the State of New Jersey denying Motion for a Stay dated July 25, 1988	55
Order of the Supreme Court of the State of New Jersey dismissing Stay as moot, dated Ju- ly 25, 1988	56
Advertisement of prescription price from Con- sumer Value Stores	57
Correspondence dated August 16, 1989 from the State Board of Pharmacy	58
Letter Complaint of the New Jersey Board of Pharmacy, dated July 15, 1986	59

TABLE OF AUTHORITIES (Continued)

Editorial of <i>The Record</i> , dated May 31, 1988 . .	61
Editorial of <i>The Record</i> , dated August 17, 1989	63
Article — National Council on Patient Information and Education, <i>Talk About Prescriptions</i> , (Oct, 1987), p.4	65

No.

IN THE
Supreme Court of the United States
OCTOBER TERM 1989

IN THE MATTER OF CVS PHARMACY, WAYNE:
TIMOTHY BROPHY, R.P., PHARMACIST IN CHARGE

Petitioner

PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF NEW JERSEY

OPINIONS BELOW

The following are reproduced in their entirety in the Appendix:

- Judgment and Opinion of the Superior Court of New Jersey, Appellate Division, dated April 28, 1988, *In the Matter of CVS Pharmacy, Wayne*, 224 N.J. Super. 631, 541 A.2d 242 (App. Div. 1988).
- Judgment and Opinion of The Supreme Court of the State of New Jersey, dated August 14, 1989, ____ N.J. ____ (1989).
- Final Order and Decision of the State Board of Pharmacy, dated February 5, 1987, *In the Matter of CVS Pharmacy, Wayne; Timothy Brophy, R.P., Pharmacist-In-Charge*.

JURISDICTION

The decision of the Supreme Court of the State of New Jersey of which review is sought was issued on August 14, 1989. No application for an extension of time to file this Petition for Certiorari has been made. This Court's jurisdiction is invoked under 28 U.S.C. sec. 1257(3).

CONSTITUTIONAL PROVISIONS & STATUTES INVOLVED

The statute of the State of New Jersey, the validity of which is involved, is Section 14-12 of Chapter 45 of the Statutes of New Jersey, found at page 79 of volume 45 of the New Jersey Statutes Annotated which provides:

. . . The Board may refuse an application for examination or may suspend or revoke the certificate of a registered pharmacist or a registered assistant pharmacist upon proofs satisfactory to the Board that such registered pharmacist or such registered assistant pharmacist is guilty of grossly unprofessional conduct and the following acts are hereby declared to constitute grossly unprofessional conduct for the purpose of this act:

f. The distribution of premiums or rebates of any kind whatever in connection with the sale of drugs and medications provided, however, that trading stamps and similar devices shall not be considered to be rebates for the purposes of this chapter and provided that discounts, premiums and rebates may be provided in connection with the sale of drugs and medications to any person who is 62 years of age or older.

g. Advertising of prescription drug prices in a manner inconsistent with rules and regulations promulgated by the Director of the Division of Consumer Affairs; provided, however, no such advertising of any drug or substance shall be authorized unless the

Commissioner of Health shall have determined that such advertising is not harmful to public health, safety and welfare.

The Constitutional Guarantees that are involved in this Petition for Certiorari include Amendment XIV, Section One of the United States Constitution which provides:

“All persons born and naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside . . . nor shall any state nor should any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of laws.”

STATEMENT OF THE CASE

In early 1985, Consumer Value Stores, a division of the Melville Corporation (“CVS”), a chain pharmacy operating in excess of fifty (50) stores in the State of New Jersey, offered all prescription drugs (with certain limited exceptions) at the price of three dollars (\$3.00) each. (A57).

On or about July 15, 1985, Timothy Brophy, as registered pharmacist-in-charge of CVS Pharmacy, 2240 Hamburg Turnpike, in the Township of Wayne, State of New Jersey, was served with a letter-complaint from the New Jersey State Board of Pharmacy. This letter-complaint charged Mr. Brophy with offering prescription discounts to persons under the age of 62 in violation *N.J.S.A. 45:14-12(f)*. This statute, in pertinent part, declares as “grossly unprofessional conduct”:

The distribution of premiums or rebates of any kind whatever in connection with the sale of drugs and medications provided, however, that trading stamps and similar devices shall not be considered to be rebates for the purposes of this chapter and provided

further that discounts, premiums and rebates may be provided in connection with the sale of drugs and medications to any person who is 62 years of age or older . . .

A hearing was held before the State Board of Pharmacy on November 12, 1986 and testimony was taken from Robert Lake, a field representative for the Enforcement Bureau, and Timothy Brophy. Mr. Lake testified that in March of 1985 he received a circular in the "Today" newspaper which offered prescription drugs for sale at the CVS Pharmacy in Wayne at a price of three dollars (\$3.00) each. Mr. Lake mailed the circular, together with a memorandum to his supervisor for evaluation. There was no further investigation, and Lake did not go to the Wayne CVS store which had advertised the three dollar (\$3.00) prescription price. On February 4, 1987 an Order was entered by the New Jersey Board of Pharmacy holding Timothy Brophy, as registered pharmacist-in-charge, in violation of N.J.S.A. 45:14-12(f). (A45)

An appeal of the Board's Order was taken to the Superior Court Appellate Division for the State of New Jersey. The petitioner, in its appeal to the Appellate Division of the Superior Court of the State of New Jersey, raised the same issues as are currently being raised before this Court. The Appellate Division, on April 28, 1988, unanimously struck down the statute at issue as being in violation of both the federal and state constitutions as well as underscoring the fact, *inter alia*, that the statute did not fulfill the purpose of serving the public health, safety or welfare. The Appellate Division of the Superior Court of the State of New Jersey questioned the validity of the statute which purported to perpetuate a sort of "marriage" between customer and pharmacist. *In the Matter of CVS Pharmacy, Wayne*, 224 N.J. Super. 631, 636 (1988) (23a). The Court further stated that even if there were a valid public purpose, it was not served by a statute which prohibited the distribution of premiums or rebates of any kind whatsoever which at the same time provided that trading stamps

and other similar devices were not considered to be rebates and had no limitation on the quantity or value of trading stamps which could be offered to a consumer in connection with the sale of prescription drugs. *Matter of CVS*, 224 N.J. Super. at 636. The Appellate Division addressed the Equal Protection argument by stating:

If the statutory purpose of this subsection is to make more effective the pharmacist's duty to monitor prescriptions (citation omitted) that purpose appears thwarted by a provision which exempts from the discount-premium-rebate ban a significant group of our population, a group which is most in need of protection against the danger of receiving antagonistic prescription medications. The older a person becomes the more likely the need for prescription drugs. The more prescription drugs prescribed, the greater the need for protection from the administration and receipt of conflicting drugs. Yet, under this statute, older persons may shop for less expensive drugs, while younger persons may not.

Matter of CVS, 224 N.J. Super. at 636-37. The New Jersey Appellate Division additionally addressed the vagueness issue and declared the statute unconstitutionally void for vagueness. *Matter of CVS*, 224 N.J. Super. at 637.

The Board of Pharmacy filed a Notice of Appeal to the New Jersey Supreme Court on June 13, 1988. The New Jersey Board of Pharmacy moved for a stay of the Appellate Division decision in both the Appellate Division and the New Jersey Supreme Court. This stay, which would have continued the prohibition of discounts, premiums and rebates under the statute, was denied by both Courts. The appeal to the Supreme Court of the State of New Jersey raised four main issues. The first issue related to the public policy reasons for invalidating the statute including issues relating to economic protectionism and the State's lack of a rational basis for the enactment. The second issue raised in the Supreme

Court was that the statute was unconstitutionally vague and overbroad under the Fourteenth Amendment of the United States Constitution in that it failed to give Timothy Brophy or other pharmacists adequate notice of the conduct that was prohibited. The third issue addressed the impropriety of the New Jersey Board of Pharmacy proceeding by adjudication as opposed to rulemaking in violation of the Due Process Clause of the Fourteenth Amendment of the United States Constitution. Finally, the petitioner herein argued that the New Jersey statute violated the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.

The New Jersey Supreme Court, on August 14, 1989, reversed the decision of the Superior Court Appellate Division on all issues, declared the statute constitutionally valid and reinstated the penalties against Timothy Brophy. However, the New Jersey Supreme Court disagreed with the mechanics and conflicting means of how the state was attempting to achieve its goal. The New Jersey Supreme Court relied on the presumed validity of price control statutes and found that there was a "conceivable rational purpose" (A37). The Court also found that the statute was not an irrational response to the legislative goal of patient monitoring (A37). Additionally, the New Jersey Supreme Court stated "nor do we find that the statute is an unwarranted exercise in economic protectionism." (A39). The Court held that administrative agencies have wide discretion in selecting the means to fulfill their delegated duties and as a result, rulemaking was not required over adjudication in this case (A42). Finally, the New Jersey Supreme Court held that the statute was not unconstitutionally void for vagueness (A39) and did not violate the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution (A41).

Subsequent to the New Jersey Superior Court decision, at the request of the petitioner herein, the New Jersey Board of Pharmacy granted a temporary stay of enforcement of the

New Jersey Supreme Court decision by agreeing to withhold the enforcement of the statute until September 13, 1989. (A58)

On Wednesday, September 13, 1989, Consumer Value Stores requested that the New Jersey Board of Pharmacy stay enforcement of the statute pending the outcome of the Appellant's review by the United States Supreme Court. However, at that time the New Jersey Board of Pharmacy ruled that it would not stay enforcement of the statute. As of September 14, 1989, the Board of Pharmacy commenced enforcement of the statute against pharmacists, thereby preventing pharmacists from accepting existing offers of discounts and preventing them from distributing new offers of discounts, rebates or premiums; a practice which has been in effect since the Appellate Division declared the statute unconstitutional in 1988.

On September 15, 1989, application was made on an emergent basis to the Superior Court of New Jersey Appellate Division to review the action of the New Jersey Board of Pharmacy in denying the Appellant's request to stay enforcement of *N.J.S.A. 45:14-12(f)*. A hearing was held before Hon. James H. Coleman, Jr. J.A.D., on September 15, 1989. Sandra Y. Dick, Esq., Deputy Attorney General, appeared on behalf of the Board of Pharmacy to oppose the motion. William I. Strasser, Esq. appeared on behalf of "CVS." The Appellate Division determined that it would be appropriate to hear the motion and denied the Motion for a Stay.

On September 28, 1989, a Motion for a Stay was filed with the United States Supreme Court. On October 2, 1989 the motion for a Stay was denied by the Honorable William J. Brennan, Jr. Pursuant to *Rule 43* of the Rules of the Supreme Court of the United States, request was made that the Motion be submitted to the Honorable Harry A. Blackmun for his consideration. Justice Blackmun referred the motion to the full Court and on October 16, 1989 the Court denied the

petitioner's motion for a Stay. This Petition for Certiorari now follows.

REASONS FOR GRANTING THE WRIT

1. THE DECISION OF THE NEW JERSEY SUPREME COURT, INVOLVING NUMEROUS SUBSTANTIAL FEDERAL QUESTIONS WHICH AFFECT THE PUBLIC HEALTH, SAFETY AND WELFARE, NECESSITATES A THOROUGH EXAMINATION BY THIS COURT.

The New Jersey Supreme Court's opinion in this case reflects a decision on important statutory and policy considerations which have a substantial effect on the consumers of the State of New Jersey, retail pharmacists and pharmacies of the State of New Jersey, as well as consumers nationwide.

Briefly, as will be more fully discussed herein, the Constitutional Rights of the consumers and pharmacists are violated by virtue of the enforcement and existence of the statute in question. This is based on the fact that consumers are entitled to purchase prescription drugs at a pharmacy of their choice, without undue influence from the state. Moreover, the mechanics of the statute in question compel the individual to shop at the same pharmacy against their will or with great reluctance and place pharmacists in jeopardy of economic deprivation, and inhibits the pharmacists ability to pursue his livelihood despite the New Jersey Supreme Courts reasoning to the contrary.

Although the New Jersey Supreme Court found the statute to be valid, pharmacists in the State of New Jersey continue to practice without rules and regulations which were to be promulgated pursuant to said statute. By doing so a pharmacist is subjected to penalties for conduct which cannot be discerned from the language of said statute. Therefore, the statute herein remains overly broad and vague.

Public policy is also a significant factor in the petitioner's Petition for Certiorari since there are significant issues of constitutional dimension and public sentiment favoring the offering of discounted prescription drugs as well as favoring the examination of the constitutional validity of the statute herein.

The New Jersey Supreme Court held that the statute in question does in fact promote the public health, safety and welfare and is not void for vagueness. Accordingly, the New Jersey Supreme Court has determined that the statute withstands constitutional scrutiny. By doing so, the Court has found the statute to be within legislative discretion and thereby in accord with public policy and the United States Constitution. Furthermore, the New Jersey Supreme Court has affirmed that said statute is not in violation of the Equal Protection and Due Process Clauses to the United States Constitution.

However, the petitioner submits that said statute is unconstitutional under the Due Process and Equal Protection Clauses of the United States Constitution in that it inversely discriminates against classes of persons based upon age, promotes economic protectionism and fails to adequately define the conduct which is prohibited. The decision of the Supreme Court of the State of New Jersey can be said to be nothing less than diametrically opposed to the constitutional considerations and reasoning evident in the unanimous decision by the Appellate Division of the Superior Court of the State of New Jersey which struck down said statute as unconstitutional. The Appellate Division forcefully stated that any statute which purports to perpetuate a sort of "marriage" between the customer and pharmacist could not be valid due to the fact that a state cannot do by indirection what it is prohibited from doing by direct legislation. Moreover, in accord with the decision of the Appellate Division it is respectfully submitted that even if there were a valid public purpose, it is not served by a statute which

prohibits the distribution of "premiums or rebates of any kind whatsoever in connection with the sale of drugs and medications," and at the same time provides "that trading stamps and other similar devices shall not be considered rebates . . . " *Matter of CVS Pharmacy*, 224 N.J. Super. at 636.

The statute further provides: "discounts, premiums and rebates may be provided in connection with the sale of drugs and medications to any person who is 62 years of age or older." If the statutory purpose of this provision is to make more effective the pharmacist's duty to monitor prescriptions (N.J.A.C. 13:39-9.13) that purpose appears thwarted by a provision which exempts from the discount-premiums-rebate ban a significant group of our population, a group most in need of protection against the danger of receiving antagonistic prescription medications. Yet, under this statute, older persons may shop for less expensive drugs, while younger persons may not. *Matter of CVS*, 224 N.J. Super. at 636-637. It must be suggested that this method of statutory construction puts at a competitive disadvantage a particular group, in this case retail pharmacists and pharmacies, as against individual pharmacists. Therefore, for the reasons expressed, it is respectfully submitted that the final decision of the New Jersey Supreme Court was improperly decided and contrary to federal constitutional provisions and therefore must be examined.

2. **THE NEW JERSEY SUPREME COURT IMPROPERLY HELD THAT AN ADMINISTRATIVE AGENCY CAN PROCEED BY ADJUDICATION RATHER THAN RULEMAKING WHERE THERE IS NO STATUTORILY DEFINED CONDUCT WHICH IS PROHIBITED. THEREFORE, THE ACTION OF THE NEW JERSEY SUPREME COURT SHOULD BE REVIEWED BY THIS COURT.**

Administrative agencies are given discretionary latitude as to the selection of a particular proceeding suitable to achieving their regulatory function, such as rulemaking or adjudication. However, there are limitations on the discretion which is afforded agencies in this respect. The New Jersey Supreme Court improperly permitted the agency in this case, the New Jersey Board of Pharmacy, to proceed by *ad hoc* adjudication against Timothy Brophy. *N.J.S.A. 45:14-12(g)* states:

Advertising of prescription drug prices in a manner inconsistent with the rules and regulations promulgated by the director of the Division of Consumer Affairs; provided, however, no such advertising of any drug or substance shall be authorized unless the commissioner of health shall have determined that such advertising is not harmful to the public health, safety and welfare.

The New Jersey Board of Pharmacy failed to carry out any rulemaking, leaving the pharmacists and the pharmacies in the State of New Jersey without sufficient substantive guidelines to determine in advance the conduct which was actually subject to regulation and prohibited. *N.J.S.A. 45:14-12(f)*, fails to define the terms "discount," "premium," "rebate" or "trading stamps." In the absence of rulemaking, it would be inappropriate to proceed by adjudication since

the prohibited conduct was not adequately set forth by the statute.

The Supreme Court relied upon *State Department of Environmental Protection v. Stavola*, 103 N.J. 425, 511 A.2d 622 (1982). In the *Stavola* case the New Jersey Department of Environmental Protection sought to enjoin the construction of luxury "cabanas" located near beach clubs under the "Coastal Area Facility Review Act." The Court in *Stavola* held that rulemaking was required where there was no express statutory authority for the adjudicative action. The Court further found that the "statute and the regulations read together were confusing and misleading." It is clear that the New Jersey Supreme Court's reliance upon the *Stavola* case is misplaced. While an agency is not completely precluded from announcing principals in an adjudicative proceeding, *SEC v. Chenery*, 332 U.S. 194 (1947), it may be appropriately limited in its acts of adjudication. This is especially applicable in this case where the enabling statute does not adequately define the prohibited conduct.

The activity of the petitioner, that is, price setting as displayed in an advertisement, does not in any fashion violate the prohibitions contained in *N.J.S.A. 45:14-12(f)*. Moreover, the lack of any specific statutory standards relating to such conduct has and will continue to result in the inability of pharmacies and pharmacists to determine the specific conduct which is subject to regulation. In the absence of agency rulemaking, it is inappropriate to proceed by adjudication as was the case against Timothy Brophy. As is apparent from the language in the statute, and the specific section under which Timothy Brophy was charged, there is no specific prohibition of the conduct on the part of the pharmacist for selling all prescriptions for three dollars (\$3.00) each. For that reason, the action of the New Jersey Board of Pharmacy should be held to be fundamentally unfair and violative of the Due Process clause of the Fourteenth Amendment to the United States Constitution.

3. A SIGNIFICANT CONSTITUTIONAL ISSUE EXISTS WHERE A STATE SUPREME COURT UPHOLDS THE CONSTITUTIONALITY OF A STATE STATUTE IN WHICH THE STATUTE FAILS TO DEFINE SPECIFIC TERMS RELATING TO THE PROHIBITED CONDUCT AND DOES NOT GIVE ADEQUATE NOTICE OF THE PROHIBITED CONDUCT TO THE CLASS OF PERSONS REGULATED BY THE STATUTE.

It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1971). The statute under review regulates the conduct of pharmacists in the State of New Jersey. Typically, a statute must set cognizable standards so as to be able to fairly regulate conduct and withstand public scrutiny. A statute should be held void for vagueness when its words fail to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden. *Grayned v. City of Rockford*, 408 U.S. at 108. Moreover, vague laws offend several important values. Initially, vague laws trap the innocent by not providing fair warning. E.g., *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972); *Cramp v. Board of Public Instruction*, 368 U.S. 278, 287 (1961); *United States v. Harriss*, 347 U.S. 612, 617 (1954); *Jordan v. De George*, 341 U.S. 223, 230-232 (1951); *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939); *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926); *United States v. Cohen Grocery Co.*, 255 U.S. 81, 89 (1921); *International Harvester Co. v. Kentucky*, 234 U.S. 216, 223-224 (1914). Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. E.g., *Papachristou v. City of Jacksonville*, supra; *Coates v. Cincinnati*, 402 U.S. 611, 614 (1971); *Gregory v. Chicago*, 394 U.S. 111, 120 (1969) (Black, J., concurring); *Interstate Circuit v. Dallas*, 390 U.S. 676, 684-685 (1968); *Ashton v. Kentucky*, 384 U.S. 195, 200 (1966); *Giac-*

cio v. Pennsylvania, 382 U.S. 399 (1966); *Shuttlesworth v. Birmingham*, 382 U.S. 87, 90-91 (1965); *Kunz v. New York*, 340 U.S. 290 (1951); *Saia v. New York*, 334 U.S. 558, 559-560 (1948); *Thornhill v. Alabama*, 310 U.S. 88, 97-98 (1940); *Herndon v. Lowry*, 301 U.S. 242, 261-264 (1937).

In the case *sub judice*, a pharmacist of ordinary intelligence, by reading *N.J.S.A. 45:14-12*, would not be on notice of the conduct prohibited by the statute. The New Jersey Superior Court, Appellate Division, appropriately recognized this statute to be void for vagueness because there was "no baseline price from which a pharmacy could be charged with providing a discount in connection with the sale of a prescription drug." *Matter of CVS Pharmacy*, 224 N.J. Super. at 637. It is inconceivable that it would require a decision of the New Jersey Superior Court Appellate Division and the New Jersey Supreme Court to determine the intent of a New Jersey statute. Also of great interest is the fact that both decisions were contrary to each other. It is for precisely this reason that it would be inappropriate to allow such a statute to withstand a challenge for vagueness. In the absence of a baseline price, it is not possible to offer a "discount, rebate or premium" on the price of a prescription drug. For, without a baseline price, there is no possible way to establish what conduct would constitute a discount and what conduct would constitute merely a price change. Clearly it would be inappropriate for a state legislature to prohibit pharmacies from reducing prices on prescription drugs after a pharmacy has established a particular price for a drug.

To address this very issue, the New Jersey Board of Pharmacy, in its Brief before the New Jersey Supreme Court, interpreted the statute as merely prohibiting pharmacies from offering "razzle dazzle short term discounts" to induce customers to jump from pharmacy to pharmacy to benefit from the rebate or premium offer. When we consider the language of *N.J.S.A. 45:14-12* and apply the case law dealing with statutory imprecision and vagueness, it is clear that the

Appellate Division of the Superior Court of the State of New Jersey was acting appropriately declaring the statute unconstitutional void for vagueness. In dealing with a question of constitutional dimension such as this, we must look to the statute, the meaning of the words within the statute, and the fair interpretations of the terms of the statute. In doing so, we are unable to fairly and realistically establish the conduct which is prohibited by the statute due to its vagueness and imprecision.

In the case *sub judice*, the Board of Pharmacy stipulated early on that the defendant did not offer a coupon, rebate or premium. Since the statute offers no guidelines as to what price constitutes a discount, the price change that occurred at the Wayne CVS cannot and does not constitute a discount or a violation of the subject statute. Although the New Jersey Board of Pharmacy attempts to justify and explain the statutory language and intent of the legislature through its briefs in the subject litigation, it is clear from the statute that “razzle dazzle discounts” or “short term discounts” are nowhere prohibited by the statute. A straightforward reading of the statute indicates that no price reduction may ever be taken by a pharmacist after the usual and customary price has been set.

This attempt at refining and explaining by the Board of Pharmacy clearly establishes the vagueness of the within statute. Moreover, the New Jersey Supreme Court recognized that the goals of the legislature and the Board of Pharmacy are conflicting (A36). While the legislature chose to enact a statute protecting small pharmacists under the guise of addressing professional standards, the Board of Pharmacy saw the legislative intent as protecting the patient profile system in New Jersey. After the legislative enactment, the Board took no steps to make rules to specifically define or govern the required conduct of pharmacists even in light of the recognized conflict between the legislative and agency goals. The legislative confusion above illustrates the vagueness of the statute. This, coupled with the lack of administrative rules or

establishment of a baseline price, renders the statute unconstitutionally vague. In conclusion, the vagueness and overbreadth of *N.J.S.A. 45:14-12(f)* requires that this Court review the decision of the Supreme Court of the State of New Jersey.

4. A STATE LEGISLATURE MAY NOT ENACT PRICE CONTROL STATUTES WHICH EFFECTIVELY CONSTITUTE ECONOMIC PROTECTIONISM OF ONE GROUP OVER ANOTHER WHERE THE ENACTMENT IS NEITHER IN THE PUBLIC INTEREST NOR RATIONALLY RELATED TO ANY LEGITIMATE STATE PURPOSE.

The legislature of the State of New Jersey improperly enacted *N.J.S.A. 45:14-12(f)*, which effectively prohibits the offering of discounts, rebates or premiums on prescription drugs sold within the State of New Jersey. The New Jersey Board of Pharmacy, in enforcing this statute, has declared that the legislative purpose for prohibiting discounts on prescription drugs is to foster the "Patient Profile System" which is currently in effect in the State of New Jersey.

In 1972, the Board of Pharmacy adopted a rule setting forth the requirements for the maintenance of a patient profile record system within each pharmacy for each individual to whom prescription drugs are dispensed. *N.J.A.C. 13:39-9.13*. This system, which has become known as the "Patient Profile System," requires that a pharmacist attempt to ascertain and record any allergies or idiosyncrasies of a patient and any chronic condition which relates to drug utilization and maintain a record on each patient containing this information. The regulation further requires that when a pharmacist receives a prescription, he examine the patient's profile record before dispensing any medication to determine the possibility of a harmful drug interaction, reaction, or misutilization of the prescription. If a pharmacist determines

that a particular prescription will possibly have a harmful effect, the pharmacist is required to take appropriate action to avoid or minimize the problem. Since the patient profile system is maintained separately by each pharmacy, the state contends that any policy which would encourage an individual to shop between pharmacies is detrimental to the profile system.

However, there is no rationality to the state's position when we consider that the statute expressly excludes individuals age 62 or older. Persons over the age of 62 are statistically more likely to use prescription drugs than their younger counterparts. Therefore, any protection for prescription interactions, reactions or misutilizations would properly be geared toward protecting the older age category. However, the New Jersey statute at issue excludes the older population from the prohibition on discounts, rebates and premiums and permits pharmacies to offer discount drugs to persons age 62 or older. Such legislation on its face is unconstitutionally arbitrary and discriminatory and further, does not foster or promote the public health, safety and welfare and is demonstrably irrelevant to the legislative purpose. See *Pennell v. San Jose*, 485 U.S. 1 (1988).

This Court in *City of New Orleans v. Dukes*, 427 U.S. 297 (1976) held that economic regulation must be rationally related to a legitimate state interest and rational distinctions may be made with less than mathematical exactitude. In the case *sub judice* there is no question of mathematical exactitude. The statute specifically excludes from protection those persons who are most in need of protection by the statute.

Moreover, it is highly questionable whether unprofessional conduct could be equated with offering discounts to a person younger than age 62 but not unprofessional conduct to offer a discount to individuals over the age of 62. Such a distinction derives from no rational basis whatsoever. Although there may exist some humanitarian and policy reasons for according senior citizens this special status, the sub-

ject prohibition bears no relationship to the determination of whether conduct is in fact "grossly unprofessional." The concept that the price at which a pharmacist sells a drug in any way relates to the professional conduct of a pharmacist is without logic. A profession cannot be restricted in a way that monetary policies are the basis for which standards of conduct are governed and regulated.

Since the statute is merely a commercial and economic regulation bearing no relationship to the preservation of "professionalism" or to the public health and does not foster the patient profile system, there exists no rational state interest to be furthered by *N.J.S.A. 45:14-2(f)*. Thus, the means selected are irrelevant so as to be irrational. Moreover, the Superior Court of New Jersey Appellate Division examined the issue of whether this statute promotes and fosters the patient profile system and found that the statute did not fulfill the legislative purpose as proffered by the state. The statute prohibits the distribution of premiums or rebates of any kind, and at the same time, permits trading stamps and other similar devices to be employed. Thus, patrons would continue to shop at numerous pharmacies for the purpose of obtaining the maximum amount of "trading stamps or other similar devices" with the purchase of their prescription drugs. *Matter of CVS*, 224 N.J. Super. at 636.

In addressing the position of the State with regard to the goal of the statute and the maintenance of the patient profile card system, it is clear that this statute does not, and cannot, assist the pharmacist in maintaining accurate client records. Patrons cannot be compelled to shop at a certain pharmacy by this or any other statute, in the same way that patients cannot be restricted to the use of one physician by legislative action. As a result, regardless of the operation of the subject statute, the prescription monitoring system currently in effect is not flawless. Absent a severe restraint on obvious personal and constitutional rights, the monitoring system will never accomplish the goals proffered by the state. The prescription

monitoring system can certainly *assist* the pharmacist and patron in ascertaining that all prescriptions purchased at a particular pharmacy are not in any way contraindicated, however the monitoring system as it currently exists, will not and cannot enable the pharmacist to advise a patron if prescriptions purchased at drugstore "A" are contrary to those purchased at drugstore "B." Thus, the goal of the statute would thereby be defeated.

Underlying the reasoning behind the New Jersey Supreme Court decision is the disturbing fact that a judicial precedent has been set through the upholding of a state statute that effectively permits the circumvention of the constitutional rights of certain members of a professional group while others are enabled through statute to compete with unfair advantage in the marketplace. The reality of the legislative goal in establishing the statute in question is such that it was promulgated merely for the purpose of the economic protection of a limited group in a profession whose lobby in a state legislature is more effective or more powerful than the lobby of others in the profession. In summary, the constitutional upholding of the within statute erroneously supports the premise that legislative bodies can enact statutes which place members of a certain professional group at an unfair advantage to other members in their ability to compete effectively in their profession.

5. THE DECISION BELOW CONSTITUTES A VIOLATION OF THE EQUAL PROTECTION CLAUSE OF THE UNITED STATES CONSTITUTION BY NOT ESTABLISHING A RATIONAL BASIS FOR THE DISTINCTION BETWEEN INDIVIDUALS AGE 62 AND OLDER AND THOSE INDIVIDUALS UNDER AGE 62

The Fourteenth Amendment of the United States Constitution, which provides for the equal protection of individuals under the law, allows for the legislative creation of classifications of persons entitled to special treatment. The

concept of equal justice under law requires a state to govern impartially. *New York City Transit Authority v. Beazer*, 440 U.S. 568, 587 (1979). The legislatively created differential treatment afforded to a class of persons is legitimized when there is a rational relationship between the class created and the state interest supporting such legislative enactment. This rational basis approach is applied so long as the statutes created do not undermine any fundamental rights or involve any suspect classifications.

Any analysis of a statute on equal protection grounds under the Fourteenth Amendment must begin with a three step approach. A statute involving fundamental rights or a suspect class such as race or national origin will be subject to strict scrutiny and thus must further a compelling state interest and there must be no less restrictive alternatives available. *Graham v. Richardson*, 403 U.S. 365, 372 (1970). When a legislative enactment is based upon a semi-suspect class or substantially effects a fundamental right in an indirect way, the enactment is subjected to intermediate scrutiny which requires that it must be substantially related to an important state interest. *Mississippi University for Women, et al. v. Hogan*, 458 U.S. 718, 724 (1982). The third approach is the rational basis test which applies when neither strict nor intermediate scrutiny apply. Although there are no guidelines as to what classifications fall under this approach, the standard of review requires that the statute must be rationally related to an important government interest. That is, whatever classification is involved, the objective for designing that classification put forth by the state, must be rationally related to that classification. *McLaughlin, et al. v. Florida*, 379 U.S. 184, 190 (1964).

To date, age has not been determined to be a classification which involves a suspect class or the impairment of a fundamental right. Thus, a statute involving an age classification typically has not been subject to a strict scrutiny or intermediate scrutiny test. However, the use of age as a classi-

fication within a statute subjects that statute to a rational basis test. Therefore, as in all equal protection cases, the crucial question is whether there is an appropriate government interest suitably furthered by the differential treatment. *Police Department of Chicago v. Mosley*, 408 U.S. 92, 95 (1972).

In reliance upon these principles, the New Jersey Supreme Court applied a rational basis approach to the age classification of the statute. Without substantial inquiry into the effects of the classification upon which the statute was based, the court below held that the statute was rationally related to a legitimate government goal. However, the court failed to determine whether that goal was actually promoted by the statute.

The legitimate government goal that the state legislature purports to achieve is that of maintaining professional and ethical standards of a licensed pharmacist in the State of New Jersey. However, the New Jersey Board of Pharmacy argues that the legitimate government goal that the statute attempts to achieve is that of aiding the pharmacist in more effectively monitoring the distribution of prescription drugs to consumers. It is clear that the position of the former and the latter are in conflict. Accordingly, the statute fails to rationally relate to that goal by excluding from the parameters of the statute those consumers age 62 and older and forbidding any benefit to all others. However, the mere recitation of a benign purpose does not protect against an inquiry into the actual purposes underlying the statutory scheme. *Weinberger v. Wiesenfeld*, 420 U.S. 636, 648 (1975); See *Eisenstadt v. Baird*, 405 U.S. 438 (1972). As a person ages, they become more in need of prescription drugs. The more prescription drugs prescribed, the greater the danger of ingesting incompatible medications. Thus, those consumers age 62 and older are most significantly in need of protection through a monitoring system and a statute that effectively discourages "pharmacy hopping".

The statute specifically allows for the use of premiums, rebates and discounts in connection with the sale of prescription drugs to persons age 62 and over. Such provision encourages persons age 62 and over to shop around for less expensive drugs thereby defeating the purported purpose of the statute. Individuals over age 62, who are more apt to be using prescription drugs in greater quantities, and who are fraught with more illnesses than most individuals under that age and who are most susceptible to adverse reactions from conflicting drugs, are virtually "unprotected" by this statute. Thus, the group in most need of protection is encouraged to patronize several pharmacies for discounts which in effect destroy the overall concept of the state's professed purpose of maintaining the patient profile system. The very evil which the statute is purported to avoid is exacerbated.

In reliance upon what is conceived to be a reasonable legislative response to economic pressure on the elderly, the New Jersey Supreme Court found that the exemption within the statute for people age 62 or older was rationally related to a legitimate government goal. However, the Court took notice that the effect of the exemption is diluted because of the PAA program, which already relieved the economic pressure on the elderly through a co-payment program. Thus, in so holding, the Court is conceding that this statute is not rationally related to the goal of relieving economic pressure from the elderly. Hence, the distinction as stated in the statute between people over and under the age of 62 is clearly arbitrary and discriminatorily aimed at, and to the detriment of, the class of persons below age 62 who deserve equal treatment. This Court has held that a state may not draw distinctions between individuals based solely on differences that are irrelevant to a legitimate governmental objective. *Lehr v. Robertson*, 463 U.S. 248, 265 (1983), citing *Reed v. Reed*, 404 U.S. 71, 76 (1971). Therefore, the statute fails this Court's Federal Equal Protection analysis and violates the Equal Protection principles of the United States Constitution.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Supreme Court of the State of New Jersey.

Respectfully submitted,

William I. Strasser
*Attorney for Petitioner, Consumer
Value Stores, A Division of Melville
Corporation*

November 13, 1989

APPENDIX
APPELLATE DIVISION,

224 N.J. Super. Matter of CVS Pharmacy, Wayne.
Cite as, 224 N.J. Super. 631

**IN THE MATTER OF CVS PHARMACY,
WAYNE: TIMOTHY BROPHY, R.P.,
PHARMACIST-IN-CHARGE.**

Superior Court of New Jersey
Appellate Division

Argued January 12, 1988 — Decided April 28, 1988.

SYNOPSIS

Review was sought of decision by State Board of Pharmacy finding pharmacist to have committed act of grossly unprofessional conduct due to pharmacy's advertising of discounts. The Superior Court, Appellate Division, Arnold M. Stein, J.S.C. (temporarily assigned), held that statute subjecting pharmacists to penalty for distribution of premiums or rebates did not fulfill purpose of serving public health, safety, or welfare, and was void for vagueness.

Reversed.

1. Drugs and Narcotics

Statute providing that distribution of premiums or rebates in connection with sale of drugs and medications would constitute grossly unprofessional conduct on part of pharmacist, but which excluded trading stamps or similar devices from its prohibition, and did not apply to sales to

persons 62 or older, was unconstitutional in that it did not fulfill purpose of serving public health, safety, or welfare, notwithstanding State's contention that prohibition discouraged patients from shopping around for best prescription price, which would tend to keep patient anchored to one pharmacy, promoting greater opportunity to monitor patient's prescription purchases. N.J.S.A. 45:14-12, subd. f.

2. Drugs and Narcotics

Statute providing that distribution of premiums or rebates in connection with sale of drugs and medications would constitute grossly unprofessional conduct on part of pharmacist was void for vagueness inasmuch as there was no fixed or otherwise identifiable price from which discount was to be calculated. U.S.C.A. Const.Amends. 5, 14; N.J.S.A. 45:14-12, subd. f.

Before Judges SHEBELL, GAYNOR and ARNOLD M. STEIN.

William I. Strasser argued the cause for appellant (*Donohue, Donohue, Costenbader & Strasser*, attorneys; *William I. Strasser*, on the brief).

Linda S. Ershow — Levenberg, Deputy Attorney General, argued the cause for respondent State Board of Pharmacy (*W. Cary Edwards*, Attorney General, attorney; *Andrea M. Silkowitz*, Deputy Attorney General, of counsel, and *Linda S. Ershow-Levenberg*, on the brief).

The opinion of the court was delivered by

ARNOLD M. STEIN, J.S.C. (temporarily assigned).

Timothy Brophy, the resident pharmacist at the CVS Pharmacy on Hamburg Turnpike in Wayne, was found by the State Board of Pharmacy to have committed an act of grossly unprofessional conduct, in violation of N.J.S.A. 45:14-12f. The Board imposed a penalty of \$500. We reverse and find

that subsection f is unconstitutional in that it fails to satisfy due process of law requirements in two respects: it does not fulfill the purpose of serving the public health, safety or welfare, and it is void for vagueness.

We recognize our obligation to avoid constitutional issues where a case can be decided on other grounds. *Donadio v. Cunningham*, 58 N.J. 309, 325-326 (1971). After a thorough review of the record, we conclude that there is no other basis upon which this appeal can be resolved.

In March 1985, CVS distributed mail circulars advertising that from Saturday, March 23 through Saturday, March 30, 1985, thirty-day supplies of all prescriptions, with certain specified exceptions, would be offered for sale at both of its Wayne stores for a flat price of \$3. Thereafter, in a penalty letter dated July 15, 1985, Brophy was charged with violating N.J.S.A. 45:14-12f in the following manner:

Advertisement of Discounts to persons under 62 years of age, (The distribution of premiums or rebates of any kind whatever in connection with the sale of drugs and medications) — \$500.00

Following a hearing, Brophy was found guilty. At the hearing, Brophy testified that he was the pharmacist-in-charge of the Hamburg Turnpike CVS store during the week of the \$3 prescription offering; that the decision to run the advertisement was not made by him, but was a CVS corporate level decision; and that \$3 is not the customary price for most prescriptions; in fact, for certain drugs, this price was less than the pharmacy's acquisition cost.

N.J.S.A. 45:14-12 provides in pertinent part that

. . . the following acts are hereby declared to constitute grossly unprofessional conduct for the purpose of this act:

. . .

f. The distribution of premiums or rebates of any kind whatever in connection with the sale of drugs

and medications provided, however, that trading stamps and similar devices shall not be considered to be rebates for the purposes of this chapter and provided further that discounts, premiums and rebates may be provided in connection with the sale of drugs and medications to any person who is 62 years of age or older.

N.J.A.C. 13:39-8.14b14 makes the pharmacist-in-charge responsible for any advertising utilized by the pharmacy.

It appears that CVS is offering up Brophy as the vehicle for making an assault upon the constitutionality of *N.J.S.A.* 45:14-12f. Our Supreme Court has expressed its distaste at this procedure of risking penal sanction rather than testing a statute under the Uniform Declaratory Judgment Act, *N.J.S.A.* 2A:16-50, *et seq.* See *State v. Baird*, 50 *N.J.* 376, 378 (1967). Undoubtedly, CVS will pay any fine or penalty imposed against Brophy in addition to providing him with legal services and absorbing the cost of legal appeals. The Board of Pharmacy has greater powers of sanction. *N.J.S.A.* 45:14-12 authorizes the Board to suspend or revoke the certification of a registered pharmacist who is guilty of grossly unprofessional conduct. There is little that CVS could do for Brophy to ameliorate the professional blemish and economic deprivation resulting from such a suspension or revocation.

We reject Brophy's argument that *N.J.S.A.* 45:14-12f prohibits only the offering of premiums or rebates on drugs and medications, and does not proscribe their sale at discount. The words "discount" and "rebate" must be read to be synonymous in the context of this statute. They both mean a deduction from a gross amount, *i.e.*, an amount deducted from a sum owing or to be paid. *Funk & Wagnall's New Comprehensive International Dictionary of the English Language, Encyclopedic Edition*, pp. 364, 1051 (1973).

N.J.S.A. 45:14-12f has previously withstood judicial scrutiny. In *Supermarkets Gen. Corp. v. Sills*, 93 *N.J. Super.*

326 (Ch. Div.1966), the court upheld the validity of this provision in somewhat different form. It did not then permit "discounts, premiums and rebates" to be provided in prescription drug sales to persons 62 years of age or older. This came by later amendment. See L. 1973, c. 125, § 1. Also, N.J.S.A. 45:14-12 was amended in 1977 (L. 1977, c. 240, § 2) to delete subsection c, which at the time of the *Supermarkets* decision included as grossly unprofessional conduct:

The promotion, direct or indirect, by any means, in any form and through any media of the prices for prescription drugs and narcotics or fees or for services relating thereto or any reference to the price of said drugs or prescriptions whether specifically or as a percentile of prevailing prices or by the use of the terms "cut rate," "discount," "bargain" or terms of similar connotation; . . .

This deletion was in response to a decision by the United States Supreme Court declaring unconstitutional state laws totally prohibiting advertising of drug prices. Such blanket prohibition was deemed to be an unconstitutional intrusion upon commercial speech in violation of the first amendment of the United States Constitution. *Virginia Board of Pharmacy v. Virginia Citizens' Council*, 425 U.S. 748, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1979).

This same amendment, deleting subsection c, added a new subsection g to this statute, making as an additional ground of grossly unprofessional conduct by a pharmacist:

g. Advertising of prescription drug prices in a manner inconsistent with rules and regulations promulgated by the Director of the Division of Consumer Affairs; provided, however, no such advertising of any drug or substance shall be authorized unless the Commissioner of Health shall have determined that such advertising is not harmful to public health, safety and welfare.

More recently, in *Pharmacy, Board of*, 191 N.J.Super. 7, 9-10 (App.Div.1983), certif. den. 95 N.J. 189 (1983), app. dism. sub. nom. *CVS v. Bd. of Pharmacy*, 465 U.S. 1095, 104 S.Ct. 1583, 80 L.Ed.2d 117 (1985), we upheld the constitutionality of subsection f in dismissing an appeal from a ruling of the State Board of Pharmacy that coupon advertising was in violation of the prohibition against the issuance of rebates. We rejected the argument that the ban on rebates offends free speech rights under the First Amendment.

We recognize that this statutory provision is entitled to a presumption of validity. *Reingold v. Harper*, 6 N.J. 182, 194 (1951). At the same time, the statute must bear some relationship between the public health, safety or welfare and the legislative objective sought to be obtained — here, the banning of practices which would tend to lower standards of professional service by a pharmacist. *Abelson's, Inc. v. New Jersey State Board of Optometrists*, 5 N.J. 412, 418-421 (1950); *Supermarkets Gen. Corp. v. Sills*, 93 N.J.Super. at 338. Analysis of this statutory provision makes that relationship so gossamer as to be almost if not completely invisible.

[1] The State argues, as it did successfully in *Supermarkets*, 93 N.J.Super. at 340-341, that the prohibition against rebates and premiums discourages patients from shopping around from one pharmacy to another for the best prescription price. It is said that this will tend to keep the patient anchored to one pharmacy, promoting greater opportunity to monitor the patient's prescription purchases and thereby lessening the potential for the dispensing of antagonistic drugs in different prescriptions ordered by the same or different physicians.

We question the validity of a statute which purports to perpetuate a sort of "marriage" between customer and pharmacist. For reasons that are beyond the scope of this opinion, we doubt that the State could mandate such a binding relationship by direct legislation. We have difficulty perceiving how the State can do by indirection what it is prohibited from

doing by direct legislation. *Werner Machine Co. v. Director of Div. of Taxation*, 31 *N.J.Super.* 444, 449 (App.Div.1954), *aff'd*, 17 *N.J.* 121 (1954). However, even if this were a valid public purpose, it is not served by a statute which prohibits the distribution of "premiums or rebates of any kind whatsoever in connection with the sale of drugs and medications," and which at the same time provides "that trading stamps and other similar devices shall not be considered rebates" With no limitation on the quantity or value of trading stamps "or other similar devices" which could be offered a consumer in connection with the sale of prescription medication, the attempt to regulate price becomes meaningless. Enough trading stamps or similar devices could be provided the consumer as to make the "sale" of the prescription a virtual gift.

Further, as we previously noted, since 1973 "discounts, premiums and rebates may be provided in connection with the sale of drugs and medications to any person who is 62 years of age or older." If the statutory purpose of this subsection is to make more effective the pharmacist's duty to monitor prescriptions (*N.J.S.A.* 45:14-15; *Supermarkets*, 93 *N.J.Super.* at 341), that purpose appears thwarted by a provision which exempts from the discount-premium-rebate ban a significant group of our population, a group which is most in need of protection against the danger of receiving antagonistic prescription medications. The older a person becomes, the more likely the need for prescription drugs. The more prescription drugs prescribed, the greater the need for protection from the administration and receipt of conflicting drugs. Yet, under this statute, older persons may shop for less expensive drugs, while younger persons may not.

The problem of prescription monitoring is already effectively dealt with by statute and regulation. *N.J.S.A.* 45:14-15 requires the pharmacist to retain the original written prescription as well as a record of the drug dispensed, and the person to whom it is dispensed, accompanied by an identifi-

cation number. *N.J.A.C.* 13:39-9.13 requires the pharmacist to maintain a patient profile record system for each patient serviced by the pharmacist. This patient profile must include the patient's family name, address, age group, name of prescriber, the drug quantity and strength dispensed, and must also "attempt to ascertain and shall record any allergies and idiosyncrasies of the patient and any chronic conditions which may relate to drug utilization as communicated to the pharmacy by the patient." *N.J.A.C.* 13:39-9.13(c). This regulation has been in effect since 1973, subsequent, of course, to the decision in *Supermarkets*.

[2] *N.J.S.A.* 45:14-12f is fatally flawed in another respect: it is void for vagueness. There is no baseline price from which a pharmacist can be charged with providing a discount in connection with the sale of a prescription drug. Put another way, there is no fixed or otherwise identifiable price from which the discount is to be calculated. This provision is so indefinite and uncertain as to be void for want of due process. It is not sufficiently explicit to inform those subjected to action thereunder as to the conduct which will render them liable to its penalties. *Abelson's, Inc. v. N.J. State Board of Optometrists*, *supra*, 5 *N.J.* at 424.

For the reasons expressed herein, the final decision of the State Board of Pharmacy, finding Timothy Brophy guilty of grossly unprofessional conduct as a pharmacist, in violation of *N.J.S.A.* 45:14-12f, is reversed, and the penalty of \$500 imposed pursuant to such order is vacated.

SUPREME COURT OF NEW JERSEY
A-125 September Term 1988

IN THE MATTER OF C.V.S. PHARMACY
WAYNE

TIMOTHY BROPHY, R.P.
PHARMACIST-IN-CHARGE.

Argued March 14, 1989 — Decided August 14, 1989

On appeal from the Superior Court, Appellate Division, whose opinion is reported at 224 *N.J. Super.* 631 (1988).

Sandra Y. Dick, Deputy Attorney General, argued the cause for appellant, State Board of Pharmacy (*Peter N. Perretti, Jr.*, Attorney General of New Jersey, attorney; *Andrea M. Silkowitz*, Assistant Attorney General, of counsel).

William I. Strasser argued the cause for respondent, Timothy Brophy, (*Donohue, Donohue, Costenbader & Strasser*, attorneys; *Mr. Strasser* and *Frank Covello*, on the briefs).

Gordon J. Golum submitted a brief on behalf of *amicus curiae* New Jersey Pharmaceutical Association (*Wilentz, Goldman & Spitzer*, attorneys).

Richard B. McGlynn submitted a brief on behalf of *amicus curiae* New Jersey Council of Chain Drug Stores (*Stryker, Tams & Dill*, attorneys; *Mr. McGlynn*, *Mark L. Mucci*, and *Stephen B. Genzer*, on the brief).

The opinion of the Court was delivered by
POLLOCK, J.

The sole issue on this appeal is the constitutionality of *N.J.S.A. 45:14-12*, which provides that it is "grossly unprofessional conduct" for a pharmacist to offer discounts or rebates on the sale of drugs or medication. The Appellate Division found the statute unconstitutional, holding that it did not promote the public health, safety, or welfare, and that it was void for vagueness. 224 *N.J. Super.* 631 (1988). Because the matter involved a substantial constitutional question, the State Board of Pharmacy (Board) appealed as of right *R. 2:2-1(a)*. We reverse.

I

In March 1985, Consumer Value Stores (CVS), a chain of retail pharmacies operating in New Jersey, distributed mail circulars for its stores in Wayne, New Jersey, advertising a special one-week \$3.00 price for the vast majority of its prescription drugs. The advertisement read: "Prescription Savings. This price valid at both CVS Pharmacy Wayne stores only. All prescriptions \$3.00, Saturday, March 23 through Saturday March 30, 1985." For most drugs, the advertised price was less than the regular price for the drugs; in many instances, the price was less than the cost to CVS.

The Board subsequently issued a penalty letter to respondent, Timothy Brophy, the resident pharmacist of a CVS drug store in Wayne, charging him with violating *N.J.S.A. 45:14-12f*. The statute provides that it is "grossly unprofessional conduct" for a pharmacist to engage in

[t]he distribution of premiums or rebates of any kind whatever in connection with the sale of drugs and medications provided, however, that trading stamps and similar devices shall not be considered to be rebates for the purposes of this chapter and provided further that discounts, premiums and rebates may be provided in connection with the sale of drugs and medications to any person who is 62 years of age or older.

Here, the decision to advertise the discounted prices had been made not by respondent but by the CVS corporate management. As the pharmacist in charge, however, respondent was responsible for any advertising by the pharmacy. *N.J.A.C.* 13:39-8.14b14.

After an administrative hearing, the Board found respondent guilty and fined him \$500. In reversing, the Appellate Division found both that a discount was tantamount to a prohibitive rebate and that the statute was not reasonably related to the promotion of the public interest. The court rejected the Board's contention that the statute protected the health, safety, and welfare by discouraging the public from buying drugs at different pharmacies, a practice that the Board contended would prevent monitoring drug use by individual customers. *See Supermarkets Gen. Corp. v. Sills*, 93 *N.J. Super.* 326 (Ch. Div. 1966). The court stated:

We question the validity of a statute which purports to perpetuate a sort of "marriage" between customer and pharmacist. For reasons that are beyond the scope of this opinion, we doubt that the State could mandate such a binding relationship by direct legislation. We have difficulty perceiving how the State can do by indirection what it is prohibited from doing by direct legislation. *Werner Machine Co. v. Director of Div. of Taxation*, 31 *N.J. Super.* 444, 449 (App. Div. 1954), *aff'd*, 17 *N.J.* 121 (1954). However, even if this were a valid public purpose, it is not served by a statute which prohibits the distribution of "premiums or rebates of any kind whatsoever in connection with the sale of drugs and medications," and which at the same time provides "that trading stamps and other similar devices shall not be considered rebates * * *." With no limitation on the quantity or value of trading stamps "or other similar devices" which could be offered a consumer in connection with the sale of prescription medica-

tion, the attempt to regulate price becomes meaningless. Enough trading stamps or similar devices could be provided the consumer as to make the "sale" of the prescription a virtual gift.

[224 *N.J. Super.* at 636.]

According to the court, the irrationality of the statute was exacerbated by the exception for persons age sixty-two and over, a group that uses a disproportionate amount of prescription drugs and should, therefore, be most in need of protection. Additionally, the court found that other requirements obligated pharmacists to maintain records of drugs dispensed to patients and "to determine any harmful drug interaction, reaction, or misutilization of the prescription." *N.J.A.C.* 13:39-9.13(c).

Finally, the court concluded that the statute was vague, reasoning:

There is no baseline price from which a pharmacist can be charged with providing a discount in connection with the sale of a prescription drug. Put another way, there is no fixed or otherwise identifiable price from which the discount is to be calculated. This provision is so indefinite and uncertain as to be void for want of due process. It is not sufficiently explicit to inform those subjected to action thereunder as to the conduct which will render them liable to its penalties.

[224 *N.J. Super.* at 637 (citation omitted).]

II

In recent years, as local drug stores and large chains have battled in the marketplace, the Legislature and the Board have sought to maintain the quality of pharmaceutical services. One device for protecting public health is the requirement that pharmacists keep records of drugs purchased by

patients through a "patient profile." *N.J.S.A.* 45:14-15; *N.J.A.C.* 13:39-13(c). The underlying thought is that by recourse to the patient profile, a pharmacist can prevent a customer from taking incompatible drugs.

For several years, CVS and respondent have vigorously challenged the statute on various grounds. While the present matter was pending before the Board, respondent challenged the statute in the United States District Court for the District of New Jersey, asserting that it unconstitutionally restricted his freedom of speech. The District Court dismissed that action in reliance on *In re Board of Pharmacy*, 191 *N.J. Super.* 7 (App. Div. 1983). In that case, in which CVS was directly involved as a party, the Appellate Division found both that the statute did not constitute an infringement on its freedom of speech and that it was a proper exercise of the police power as a means of preventing unfair competition and unfair sales practices. After this Court denied certification, 95 *N.J.* 189 (1983), the United States Supreme Court dismissed the appeal, *CVS v. Board of Pharmacy*, 465 *U.S.* 1095, 104 *S. Ct.* 1583, 80 *L.Ed.2d* 341 (1980). This indicated to the District Court judge in respondent's action that the United States Supreme Court had concluded either that CVS's appeal did not present a substantial federal question or that the state courts had correctly decided the issue. Finding it to be irrelevant that CVS was involved in one matter and respondent in the other, the District Court dismissed respondent's suit.

In the present case, the Board believes that the legislative purpose behind *N.J.S.A.* 45:14-12 will be defeated by pricing practices that encourage customers to buy drugs at whatever pharmacy happens to be selling them at the cheapest price that week. CVS, however, believes a one-week price reduction is in not only its interest, but also that of the public. Deprecating the goal of patient monitoring, CVS points to the fact that the statute permits the offer of discount prices to senior citizens. To this, the Board rejoins that the Legislature may respond to the needs of different segments of the public

in various ways. The Board also points out that the Legislature has tried to help people over the age of sixty-two by providing State funds to limit the cost of prescription drugs through the Pharmaceutical Assistance to the Aged program (PAA program), *N.J.S.A.* 30:4D-25. According to the Board, the Legislature may recognize, as it has recognized in the PAA program, that for senior citizens, cost is the dispositive concern. For the general population, the Legislature could decide that patient monitoring is the dominant consideration. The Board also maintains that the statute prevents price wars that would reduce the number of pharmacies and adversely affect pharmaceutical services and professional standards. Our analysis proceeds in light of the constant, albeit sometimes conflicting, goals of the Legislature and Board to maintain the quality of pharmaceutical services in a changing market.

Respondent's primary argument is that the statute violates the principle of substantive due process under the federal and State constitutions. We begin our review of that contention by recognizing the presumption of validity that attaches to every statute. *Piscataway Township Bd. of Educ. v. Caffiero*, 86 N.J. 308, 318, *appeal dismissed*, 454 U.S. 1025, 102 S. Ct. 560, 70 L.Ed.2d 470 (1981); *Fried v. Kervick*, 34 N.J.68, 74 (1961). The presumption is particularly daunting when a statute attempts to protect the public health, safety, or welfare. *Nebbia v. New York*, 291 U.S. 502, 54 S. Ct. 505, 78 L.Ed. 941 (1934). We have consistently sustained such legislation if it "is not arbitrary, capricious, or unreasonable, and the means selected bear a rational relationship to the legislative objective." *Brown v. City of Newark*, 113 N.J. 565, 572 (1989); *see Joseph H. Reinfeld, Inc. v. Schieffelin & Co.*, 94 N.J. 400, 413 (1983); *Piscataway Township Bd. of Educ.*, *supra*, 86 N.J. at 318; *Robson v. Rodriguez*, 26 N.J. 517, 522 (1958). The presumed validity of price-control statutes, such as the present one, can be overcome only "by proofs that preclude the possibility that there could have been any set of facts known to the legislative body or which could reasonably be assumed to have been known which would rationally sup-

port a conclusion that the enactment is in the public interest." *Hutton Park Gardens v. West Orange Town Council*, 68 N.J. 543, 565 (1975); see also *Fried, supra*, 37 N.J. at 83 (upholding a ban on gas rebates). Even if a court cannot ascertain the actual purpose of the statute, it should sustain the statute if it has any conceivable rational purpose. *Williamson v. Lee Optical of Okla.*, 348 U.S. 483, 487-88, 75 S.Ct. 461, 464-65, 99 L.Ed. 563, 571-75, reh'g denied, 349 U.S. 925, 75 S. Ct. 657, 99 L.Ed. 1256 (1955); *Kotch v. Board of River Pilot Comm'rs*, 330 U.S. 552, 67 S. Ct. 910, 91 L. Ed. 1093, reh'g denied, 331 U.S. 864, 67 S. Ct. 1196, 91 L.Ed. 1869 (1947); *United States v. Carolene Prods.*, 304 U.S. 144, 152-54, 58 S. Ct. 778, 783-85, 82 L.Ed. 1234, 1241-43 (1937); see also J. Nowak, R. Rotunda, J. Young, *Constitutional Law* 446 (2d ed. 1983) ("The *Williamson* opinion suggests that the Court will not only presume that a legislature had a reasonable basis for enacting a particular economic measure, but also will hypothesize reasons for the law's enactment if the legislature fails to state explicitly the reasons behind its judgment. Consequently, anyone attempting to argue for the invalidation of a legislative economic enactment may have to discredit the Court's conceived reasons for the legislature's actions as well as the arguments for those who support the measure."). The judicial task is not to question the wisdom of the legislative decision but to ascertain whether the statute is rationally related to the public health, safety, or welfare. *Brown, supra*, 113 N.J. at 571. Similarly, courts should approve the means selected by the Legislature to achieve its purposes unless those means are so irrelevant as to be irrational. *Pennel v. San Jose*, 485 U.S. —, —, 108 S. Ct. 849, 857, 99 L.Ed.2d 1, 14 (1988); *Vance v. Bradley*, 440 U.S. 93, 97, 99 S. Ct. 939, 942-43, 59 L.Ed.2d 171, 176 (1979).

For a statute to be rationally related to the public interest, it need not be the best or only method of achieving the legislative purpose. So viewed, we cannot say that N.J.S.A. 45:14-12 is an irrational response to the goal of patient monitoring. Given the deference we are obliged to accord to an act

of the Legislature, we likewise conclude that body could have determined that the statute is an effective means of preventing destructive price wars that could adversely affect pharmaceutical services and professional standards.

In finding the statute to be irrational, the Appellate Division reasoned that two exemptions undermined the legislative purpose. *Supra* at ____ (slip op. at 4). The first exemption allows the use of trading stamps, and the second is for persons who attain the age of sixty-two. The mere fact that the statute is a partial solution, however, does not mean that it is unconstitutional. A statute enacted in the public interest remains rational although it fails to protect everyone. *City of New Orleans v. Dukes*, 427 U.S. 297, 303, 96 S. Ct. 2513, 2517, 49 L.Ed.2d 511, 517 (1976); *Williamson, supra*, 348 U.S. at 489, 75 S. Ct. at 465, 99 L.Ed. at 573. In brief, the Legislature may proceed one step at a time. It may, therefore, both permit the use of trading stamps and prohibit the offer of rebates and premiums.

Furthermore, we reject the Appellate Division's speculation that the prohibition on premiums and rebates could be undermined by the issuance of trading stamps, a practice expressly permitted by the statute. 244 N.J. Super. at 636. That notion, raised by the court on its own, is unsupported by any proof in the record that pharmacies use trading stamps to circumvent the statute. Without an adequate showing, we are reluctant to invalidate the statute for that reason.

We also find the exemption for senior citizens to be a reasonable legislative response to economic pressure on the elderly. To some extent, moreover, the effect of the exemption on senior citizens is diluted because of the PAA program, under which those citizens can purchase drugs by making a \$2.00 co-payment. According to the Department of Human Services, 246,693 senior citizens were eligible for the program in fiscal year 1988. *Division of Medical Assistance and Health Servs., Dep't of Human Servs., Pharmaceutical Assistance to the Aged and Disabled Annual Report 6* (1988).

Because their co-payment is limited to \$2.00, discounts for them are unnecessary.

Nor do we find that the statute is an unwarranted exercise in economic protectionism. Nothing in the record suggests that the statute puts any particular group at a competitive disadvantage. *See Lane Distribs., Inc. v. Tilton*, 7 N.J. 349 (1951) (tax classifications struck down when their sole purpose was to prevent small retailers from competing with large retailers). Even if the Legislature was moved in part by a desire to accord some degree of economic protection to individual pharmacists, that purpose need not invalidate an otherwise valid statute. As long as the statute has one valid purpose, we are obliged to sustain it. *Brown, supra*, 113 N.J. at 584; *Riggs v. Township of Long Beach*, 109 N.J. 601, 613 (1988).

We find to be irrelevant respondent's contention that the objectives of N.J.S.A. 45:14-12 are undermined by legislative encouragement to use generic drugs and to advertise prescription drug prices, N.J.S.A. 24:6E-1 to -13. Nothing in the record would justify the conclusion that the obligation to inform a customer of generic drugs prevents patient monitoring or promotes price wars. The customer who is offered the option of purchasing generic drugs still deals with the same pharmacist. That pharmacist merely offers a lower-priced alternative within his or her drug store. Price advertising simply informs a consumer of the price for prescriptions at a specific pharmacy. Neither practice presents the same threat to the maintenance of a patient profile as short-term price cuts.

Furthermore, we do not find the statute to be void for vagueness. The doctrine of vagueness, which is grounded in the concept of fairness, requires that a law be sufficiently clear to apprise an ordinary person of its reach. *Brown, supra*, 113 N.J. at 577; *State v. Lee*, 96 N.J. 156, 165-66 (1984); *Town Tobacconist v. Kimmelman*, 94 N.J. 85, 125 (1983). A statute may be vague facially if "there is no conduct that it proscribes with sufficient certainty," or it may be vague as applied. *State*

v. Cameron, 100 N.J. 586, 593 (1985). Here, Brophy argues that the statute is vague as applied because it fails to define the words "discount," "rebate," "premium," or "trading stamps." As the Appellate Division pointed out, however, the statute expressly prohibits the offering of rebates. The words "discount" and "rebates" "both mean a deduction from a gross amount, *i.e.*, an amount deducted from a sum owing or to be paid." 224 N.J. Super. at 634 (citation omitted). Giving the statutory language its ordinary meaning, see *Renz v. Penn Cent. Corp.*, 87 N.J. 437, 440 (1981), we are unpersuaded that an ordinary pharmacist could not understand that it was a discount to reduce prices one week and raise them the next. Nor do we find that the statute is unconstitutionally vague because it failed to provide a baseline price for the calculation of a discount. Whatever relevance that argument might have in some other context, it does not apply when the pharmacy's own prices provide all that need be known to uncover the discount.

We find no merit in respondent's argument that the senior citizen exemption violates the equal protection rights of citizens under age sixty-two. Generally speaking, federal equal protection analysis employs a three-tier system based on the affected interest. As we have stated,

[a] statute that regulates a "fundamental right" or a "suspect class" is subject to "strict scrutiny." To withstand strict scrutiny, the statute must further a compelling state interest and there must be no less restrictive means of accomplishing that objective. If a statute regulates a "semi-suspect" class or substantially affects a fundamental right in an indirect manner, it will be examined under an "intermediate scrutiny." To withstand intermediate scrutiny the classification must serve an important governmental objective and must be substantially related to the achievement of those objectives. If neither strict nor intermediate scrutiny applies, the statute will be subjected to a "rational basis" test. To withstand this

level of review, the statute must be rationally related to the achievement of a legitimate state interest.

[*Barone v. Department of Human Servs.*, 107 N.J. 355, 364-65 1987 (citations omitted).]

Persons under age sixty-two are not members of a suspect or semi-suspect class, and there is no constitutional right to purchase drugs at a discount. Hence, the appropriate standard of review is the rational-basis test. As previously explained, *supra* at ____ (slip op. at 9), the statute is rationally related to the legislative goals of patient monitoring and the maintenance of pharmaceutical services and professional standards. Consequently, we conclude that the statute passes federal equal protection analysis.

We are similarly unpersuaded by respondent's equal protection analysis under article 1, paragraph 1 of the New Jersey Constitution. In analyzing rights under the State Constitution, we balance "the nature of the affected right, the extent to which the governmental restriction intrudes upon it, and the public need for the restriction." *Greenberg v. Kimmelman*, 99 N.J. 552, 567 (1985). Here, the asserted right is that of a person under age sixty-two to purchase drugs at a discount. No matter how appealing that right may be to consumers, it does not rise to a constitutional level. Furthermore, the statute restricts the ability to purchase prescriptions only to the extent of preventing discounts, manifested here by sharp reductions for one week. According to the Board, the public needs the restriction for pharmacists to monitor the use of prescription drugs by their customers. So viewed, we cannot find that the statute violates the equal protection principles of the State Constitution.

In drawing distinctions, the Legislature need not proceed with mathematical precision. *Paul Kimball Hosp., Inc. v. Brick Township Hosp.*, 86 N.J. 429, 446-47 (1981). As long as the legislative classification is rational, it is irrelevant that it is not the wisest or the fairest alternative, or one we might

choose. So viewed, we find that the Legislature could distinguish between people over and under age sixty-two. *Barone, supra*, 107 N.J. at 370. The statute not only prevents people under sixty-two from shifting from pharmacy to pharmacy, but also prevents potentially-destructive price wars that could erode the integrity of pharmaceutical services.

Finally, we turn to the argument, raised for the first time on appeal, that the Board should have proceeded by rulemaking rather than by adjudication. Brophy argues that before instituting the present proceedings, the Board should have promulgated regulations concerning discounts and rebates. We disagree. Administrative agencies have wide discretion in selecting the means to fulfill their delegated duties. The choice of proceedings generally rests within the discretion of the agency. "Courts normally defer to that choice so long as the selection is responsive to the purpose and function of the agency." *Texter v. Department of Human Servs*, 88 N.J. 376, 383, 386 (1982); *Bally Mfg. Corp. v. New Jersey Casino Control Comm'n*, 85 N.J. 325, 338, *appeal dismissed*, 454 U.S. 804, 102 S. Ct. 77, 70 L.Ed.2d 74 (1981).

In most cases when we have required rulemaking as a condition precedent to adjudication, the agency had acted without express statutory authority in a previously unregulated area. *State, Dep't of Env'tl. Protection v. Stavola*, 103 N.J. 425 (1986) (rulemaking required when agency tried to regulate beach-front cabanas for the first time without express statutory authority); *Metromedia, Inc. v. Director, Div. of Taxation*, 97 N.J. 313, 331-32 (1984) (new tax method had to be proceeded by rulemaking when no explicit statutory authority); *Crema v. New Jersey Dep't of Env'tl. Protection*, 94 N.J. 286 (1983) (implied authority to engage in conceptual approval of projects required rulemaking before this authority could be exercised). Here, however, the Legislature has proscribed the prohibited conduct. In this context, the administrative agency need not adopt regulations before carrying out its legislative mission. The agency could proceed, as

the Board proceeded, to enforce the statute through adjudication. *Airwork Serv. Div. v. Director, Div. of Taxation*, 97 N.J. 290 (1984), *cert denied* 471 U.S. 1127, 105 S. Ct. 2662, 86 L.Ed.2d 278 (1985); *Mayflower Sec. v. Bureau of Sec.*, 64 N.J. 85 (1973).

The judgment of the Appellate Division is reversed, and the fine imposed by the Board is reinstated.

Justices Clifford, Handler, O'Hern, Garibaldi, and Stein join in this opinion. Chief Justice Wilentz did not participate.

SUPREME COURT OF NEW JERSEY**No. A-125****September Term 1988**

On appeal from Appellate Division, Superior Court

On certification to _____

**IN THE MATTER OF C.V.S. PHARMACY
WAYNE****TIMOTHY BROPHY, R.P.****PHARMACIST-IN-CHARGE**

Decided August 14, 1989

Justice Clifford Presiding

Opinion by Justice Pollock

Dissenting/Concurring opinion by

CHECKLIST	Affirms	Reverse & Reinstate	Modify	Concur in Result
Chief Justice Wilentz	✓			
Justice Clifford		X		
Justice Handler		X		
Justice Pollock		X		
Justice O'Hern		X		
Justice Garibaldi		X		
Justice Stein		X		
TOTALS		6		

**FINAL DECISION AND ORDER ISSUED
FEBRUARY 4, 1987**

**STATE OF NEW JERSEY
DEPARTMENT OF LAW & PUBLIC SAFETY
DIVISION OF CONSUMER AFFAIRS
STATE BOARD OF PHARMACY**

IN THE MATTER OF	}	
CVS PHARMACY, WAYNE;	-	Administrative Action
TIMOTHY BROPHY, R.P.,	}	FINAL DECISION AND ORDER
PHARMACIST-IN-CHARGE	J	

This matter was brought before the New Jersey State Board of Pharmacy on November 12, 1986 at the request of Consumer Value Stores in response to a uniform penalty letter issued by the Board dated July 15, 1985 to Timothy Brophy, R.P.-in-charge, CVS Pharmacy, 2440 Hamburg Turnpike, Wayne. This letter complaint charged the respondent with the following violation: advertisement of discounts to persons under 62 years of age (the distribution of premiums or rebates of any kind whatever in connection with the sale of drugs and medications) in violation of *N.J.S.A. 45:14-12(f)*.

Testimony was given by Robert Lake, a field representative employed by the Enforcement Bureau and a registered pharmacist who received a circular in his home mail from the CVS Pharmacy in Wayne, New Jersey. The circular provided: "Prescription Savings. This price valid at both CVS Pharmacy Wayne stores only. All prescriptions \$3.00, Saturday, March 23rd through Saturday, March 30th 1985." Lake did not visit or inspect the pharmacy; he did not speak to the pharmacist-in-charge, or anyone else from the CVS Pharmacy.

Timothy Brophy, the pharmacist-in-charge of the CVS Pharmacy located at 2440 Hamburg Turnpike, Wayne, New Jersey, testified to the fact that he has been employed at this

pharmacy for three years. He stated that, in his opinion, the advertising in question did not violate *N.J.S.A. 45:14-12(f)*. He further testified that advertising decisions for CVS are made at the corporate level, and not by him. Brophy admitted that prior to the distribution of the flier in question, \$3 was not the usual and customary price for all prescriptions. Brophy stated that all customers were charged \$3 for prescriptions during the week of March 23rd through Saturday, March 30th, 1985 and that the week after the prices went back to their usual and customary price.

The Board reviewed in executive session, all the evidence submitted in this matter and the testimony that was given. Based on its consideration of the evidence, the Board makes the following findings of fact:

1. Respondent Timothy Brophy is the holder of a certificate of registration to practice pharmacy within the State of New Jersey and has held such registration at all times pertinent hereto.
2. Respondent CVS Pharmacy located at 2440 Hamburg Turnpike, Wayne, New Jersey is the holder of a permit to conduct a pharmacy and has held said permit at all times pertinent hereto. Respondent Timothy Brophy is the pharmacist-in-charge of this pharmacy.
3. Respondent offered prescription discounts to persons under the age of 62 in violation of *N.J.S.A. 45:14-12(f)*.
4. Respondent distributed these discounts or premiums to persons under the age of 62 in violation of *N.J.S.A. 45:14-12(f)*.

Based upon these findings of fact, the Board makes the following conclusion of law:

1. Timothy Brophy, as the pharmacist-in-charge of the CVS Pharmacy located at 2440 Hamburg Turnpike, Wayne, New Jersey, is responsible for, among other

things, the advertising utilized by the pharmacy pursuant to *N.J.A.C. 13:39-8.14(b)(14)*.

2. Timothy Brophy violated *N.J.S.A. 45:14-12(f)*, as cited in the July 15, 1985 Penalty Letter.

THEREFORE, IT IS on this 4th day of February, 1987,

ORDERED that a civil penalty of \$500 (five hundred dollars), payable within two (2) weeks of the receipt of this Order, is hereby assessed against Timothy Brophy.

NEW JERSEY STATE BOARD OF PHARMACY

H. Lee Gladstein, R.P., Pres.

ORDER ON EMERGENT APPLICATION

IN THE MATTER
OF CVS PHARMACY,
WAYNE: TIMOTHY
BROPHY, R.P.,
PHARMACIST IN CHARGE

SUPERIOR COURT OF
NEW JERSEY
APPELLATE DIVISION
DOCKET NO.
MOTION NO.
BEFORE PART: F
JUDGE(S): COLEMAN
BRODY
MUIR

EMERGENT APPLICATION
FILED: Sept. 15, 1989

BY: William I. Strasser for
CVS etc.

ANSWER(S) FILED: Orally

BY: Sandra Y. Dick, Deputy
Atty. Gen'l for State

APPEARANCE ONLY:

BY:

DATE SUBMITTED TO COURT: September 15, 1989

DATE ARGUED: September 15, 1989

ORDER

THIS MATTER HAVING BEEN DULY PRESENTED TO
THE COURT, IT IS ON THIS 15th DAY OF September, 1989,
HEREBY ORDERED AS FOLLOWS:

EMERGENT APPLICATION FOR A
STAY OF THE IMPLEMENTATION
OF THE SUPREME COURT DECISION DENIED

SUPPLEMENTAL:

FOR THE COURT:

/s/ James H. Coleman

JAMES H. COLEMAN, JR.,
P.J.A.D.

**SUPREME COURT OF NEW JERSEY
M-163 September Term 1989**

**IN THE MATTER OF CVS PHARMACY,
WAYNE: TIMOTHY BROPHY, R.P., O R D E R
PHARMACIST IN CHARGE**

This matter having been duly presented to the Court, it is ORDERED that the motion of Consumer Value Stores for stay pending appeal is denied.

WITNESS, the Honorable Robert L. Clifford, Presiding Justice, at Trenton, on this 19th day of September, 1989.

I hereby certify that the foregoing is a true copy of the original on file in my office.

/s/ Stephen Townsend
STEPHEN TOWNSEND
CLERK OF THE SUPREME
COURT

/s/ Stephen Townsend
STEPHEN TOWNSEND
Clerk of The Supreme Court
of New Jersey

**SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543**

JOSEPH F. SPANIOL, JR.,
CLERK OF THE COURT

October 2, 1989

Mr. William I. Strasser
391 Franklin Avenue
P.O. Box 107
Nutley, NJ 07110-0107

Re: *Consumer Value Stores,*
v. Board of Pharmacy of New Jersey
Application No. A-246

Dear Mr. Strasser:

The application for a stay of enforcement of judgment of Supreme Court of New Jersey in the above-entitled case has been presented to Justice Brennan, who on October 2, 1989 endorsed thereon the following:

"Denied
Wm. J. Brennan, Jr.
10/2/89"

Very truly yours,

JOSEPH F. SPANIOL, JR.
Clerk

By /s/ Francis J. Lorson

Francis J. Lorson
Chief Deputy Clerk

NOTE — FOR YOUR INFORMATION: A copy of this letter has been sent to all interested parties shown on the attached notification list.

**SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543**

JOSEPH F. SPANIOL, JR.,
CLERK OF THE COURT

October 16, 1989

Mr. William I. Strasser
391 Franklin Avenue
P.O. Box 107
Nutley, NJ 07110-0107

Re: *Consumer Value Stores,*
v. Board of Pharmacy of New Jersey
No. A-246

Dear Mr. Strasser:

The Court today entered the following order in the above-entitled case:

"The application for stay addressed to Justice Blackmun and referred to the Court is denied."

Very truly yours,

JOSEPH F. SPANIOL, JR.,
Clerk

By /s/ Francis J. Lorson
Francis J. Lorson
Chief Deputy Clerk

ed
cc: Sandra Y. Dick
Peter N. Piretti, Jr.
Board of Pharmacy
Division of Consumer Affairs

ORDER ON CROSS-MOTION**ORDER OF APPELLATE DIVISION**

IN THE MATTER OF: CVS PHARMACY, WAYNE: TIMOTHY BROPHY, R.P. PHARMACIST IN CHARGE	GRANTING CROSS MOTION TO STRIKE MOTION FOR STAY SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-3440-3671 MOTION NO. M-3453-87 BEFORE PART: F JUDGE(S) SHERBELL GAYNOR STEIN
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CROSS-MOTION
FILED: June 23, 1988

ORIGINAL MOTION
FILED: June 13, 1988,
(See M-5217-87)

ANSWER(S) FILED:

BY:

BY:

DATE SUBMITTED TO COURT: June 29, 1988

ORDER

THIS MATTER HAVING BEEN DULY PRESENTED TO
THE COURT, IT IS ON THIS 11th DAY OF July, 1988,
HEREBY ORDERED AS FOLLOWS:

CROSS-MOTION BY
APPELLANT, TIMOTHY BROPHY, TO
STRIKE MOTION FOR STAY GRANTED
SUPPLEMENTAL:

FOR THE COURT

I hereby certify that the
foregoing is a true copy of the
original on file in my office.

/s/ Arnold M. Stein
ARNOLD M. STEIN, JSC.,
t/a P.J.A.D

/s/
Clerk of the Appellate
Division

ORDER ON MOTION WHEN CROSS-MOTION FILED

IN THE MATTER OF CVS
PHARMACY, WAYNE:
TIMOTHY BROPHY, R.P.
PHARMACIST-IN-CHARGE

SUPERIOR COURT OF
NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3440-3671
MOTION NO. M-5217-87
BEFORE PART: D
JUDGE(S) SHEBELL
GAYNOR
STEIN

MOTION FILED: June 13, 1988

ANSWER(S) FILED: BY:
BY:

CROSS-MOTION FILED: June 23, 1988 (See M-5453-87)

DATE SUBMITTED TO COURT: June 29, 1988

ORDER

THIS MATTER HAVING BEEN DULY PRESENTED TO
THE COURT, IT IS ON THIS 11th DAY OF July, 1988,
HEREBY ORDERED AS FOLLOWS:

MOTION BY RESPONDENT,
N.J. BOARD OF PHARMACY, FOR STAY
OF APP. DIV. JUDGEMENT PENDING
PETITION FOR CERTIFICATION DENIED
SUPPLEMENTAL:

FOR THE COURT

I hereby certify that the
foregoing is a true copy of the
original on file in my office.

/s/ Arnold M. Stein
ARNOLD M. STEIN, JSC.,
t/a P.J.A.D

/s/
Clerk of the Appellate
Division

ORDER OF NEW JERSEY
SUPREME COURT
GRANTING
LEAVE TO FILE STAY
DATED JULY 24, 1988

SUPREME COURT OF
NEW JERSEY M-1499
September Term 1987
29,009

IN THE MATTER OF
CVS PHARMACY,
WAYNE: TIMOTHY BROPHY, R.P.,
PHARMACIST-IN-CHARGE

ORDER

This matter having been duly presented to the Court, it is
ORDERED that the motion of the New Jersey Board of Pharmacy
for leave to file a stay as within time is granted.

WITNESS, the Honorable Robert N. Wilentz, Chief Justice,
at Trenton, this 24th day of July, 1988.

I hereby certify that the
foregoing is a true copy of the
original on file in my office.

/s/ Stephen Townsend
STEPHEN TOWNSEND
Clerk of the Supreme Court

/s/ Stephen Townsend
STEPHEN TOWNSEND
Clerk of The Supreme Court
Of New Jersey

ORDER OF SUPREME COURT
OF NEW JERSEY DENYING
STAY PENDING APPEAL
DATED JULY 25, 1988

SUPREME COURT OF
NEW JERSEY M-1450
September Term 1987
29,009

IN THE MATTER OF
CVS PHARMACY,
WAYNE: TIMOTHY BROPHY, R.P.,
PHARMACIST-IN-CHARGE

O R D E R

This matter having been duly presented to the Court, it is
ORDERED that the motion of the New Jersey Board of Pharmacy
for a stay pending appeal is denied.

WITNESS, the Honorable Robert L. Clifford, Presiding Jus-
tice, at Trenton, this 25th day of July, 1988.

I hereby certify that the
foregoing is a true copy of the
original on file in my office.

/s/ Stephen Townsend
STEPHEN TOWNSEND
Clerk of the Supreme Court

/s/ Stephen Townsend
STEPHEN TOWNSEND
Clerk of The Supreme Court
of New Jersey

ORDER OF SUPREME COURT
OF NEW JERSEY DISMISSING
MOTION OF TIMOTHY
BROPHY

SUPREME COURT OF
NEW JERSEY M-1496
September Term 1987
29,009

IN THE MATTER OF
CVS PHARMACY,
WAYNE: TIMOTHY BROPHY, R.P.,
PHARMACIST-IN-CHARGE

O R D E R

This matter having been duly presented to the Court, it is ORDERED that the motion of respondent Timothy Brophy for a denial of a stay pending appeal is dismissed as moot. See M-1450-87.

WITNESS, the Honorable Robert L. Clifford, Presiding Justice, at Trenton, this 25th day of July, 1988.

I hereby certify that the foregoing is a true copy of the original on file in my office.

/s/ Stephen Townsend
STEPHEN TOWNSEND
Clerk of the Supreme Court

/s/ Stephen Townsend
STEPHEN TOWNSEND
Clerk of The Supreme Court
of New Jersey

PRESCRIPTION SAVINGS!!!

THIS PRICE VALID AT BOTH CVS PHARMACY WAYNE STORES ONLY

ALL PRESCRIPTIONS**\$3.00****SAT., MARCH 23 THRU SAT., MARCH 30, 1985****VALID AT OUR WAYNE STORES ONLY**

(SEE ADDRESSES LISTED BELOW)

**The Following Medications
Are Excluded:**

Accutane 10 mg, 40 mg
Corgard 40, 80, 120, 160 mg
Denocrine 200 mg
Minocin 50 mg, 100 mg
Minipress 5 mg
Feldene 20 mg
Clomid
Capoten 50 mg, 100 mg
Zentac 150 mg
Tagamet 400 mg
Tenormin 50 mg, 100 mg
Sandimmune Sel. 100 mg
Naprosyn 375 mg, 500 mg
Parlodol 5 mg

**EXCEPTIONS
AND RESTRICTIONS**

- Limit 30 day supply of any medication
- Class II drugs/narcotics excluded
- Chemotherapy agents excluded
- All injectables & biologicals excluded
- Drugs intended for office use excluded

Your CVS Pharmacist will be happy to answer
any questions you may have concerning
prescription prices.

WAYNE

2440 Hamburg Turnpike
Corner of Tehrune Drive
839-3400

CVS
pharmacy

WAYNE

Preakness Shop. Ctr
Hamburg Turnpike
Near Goodyear Tire
694-5500

CORRESPONDENCE DATED AUGUST 16, 1989
FROM THE STATE BOARD OF PHARMACY

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

August 16, 1989

William I. Strasser, Esq.
Donohue, Donohue, Costenbader & Strasser
391 Franklin Street
P.O. Box 107
Nutley, NJ 07110-0107

RE: Licensee Compliance with N.J.S.A. 45:14-12

Dear Mr. Strasser:

In response to your letter of August 15, addressed to the Attorney General, please be advised that the Board has determined that in order to provide its licensees with an adequate opportunity to conform their practices with the above cited statute as sustained by the Supreme Court's decision of August 14, and to properly inform the public with regard to the honoring of currently outstanding discount coupons, premiums or rebates, such coupons as may be outstanding as of August 14 may be honored until the close of business on September 13, 1989. On September 13 the Board at its regularly scheduled meeting will review the matter further.

It should clearly be noted, however, that the Board's position applies only to currently outstanding coupons and does not contemplate the issuance or distribution of any new discount coupons, premiums or rebates subsequent to August 14. The Board expects its licensees to take all possible steps to halt any further distribution or publication of new coupons or premiums.

Very truly yours,

/s/ H. Lee Gladstein, RP

H. LEE GLADSTEIN, RP
Executive Director

SENT VIA FAX AND REGULAR MAIL

LETTER COMPLAINT OF THE NEW JERSEY
BOARD OF PHARMACY, DATED JULY 15, 1986

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

July 15, 1985

Timothy Brophy, R.P.-in-charge.
CVS Pharmacy
2440 Hamburg Turnpike
(Corner of Tehrune Dr.)
Wayne, NJ 07470

RE: DISCOUNTS-REBATES-COUPONS.

Dear Mr. Brophy:

This is to advise you that the Board of Pharmacy has received and reviewed certain information regarding activity in which you were engaged as a Board licensee. The Board's initial review discloses what appear to be a violation(s) of:

NJSA 45:14-12(f) — Advertisement of Discounts to persons under 62 years of age, (The distribution of premiums or rebates of any kind whatever in connection with the sale of drugs and medications) — \$500.00

You are hereby offered the opportunity to settle this matter and avoid the initiation of formal disciplinary proceedings by signing the enclosed certification and paying a civil penalty in the amount of \$500.00. Alternatively, you may waive your right to a hearing and submit a written statement or explanation to the Board. The Board will consider this statement and render a final decision thereon. You may also request a hearing in which case the matter will be scheduled and this notice will serve as a complaint. At the hearing you may, either personally or with the assistance of an attorney, submit such testimony or other evidence as you may deem necessary in order for the Board to finally determine whether the unlawful acts set forth herein have been proven.

You should also be aware that upon final evaluation of the evidence submitted at the hearing, the Board may if unlawful acts are found to exist assess civil penalties in an amount greater than

that herein offered in settlement. Additionally, the Board may, if the facts are found to so warrant, enter an order requiring the restoration of any monies acquired by unlawful acts, the payment of costs and directing that you cease and desist from continued use of those acts found to be unlawful.

The enclosed certification should be returned to the Board with your indicated course of action within ten days following receipt hereof. In the event that the Board receives no response within ten days, the allegations contained herein shall be deemed admitted and the Board will proceed to finally review this matter and enter an appropriate final order in relation thereto.

Sincerely yours,

NEW JERSEY BOARD OF
PHARMACY

/s/ Robert J. Terranova

Robert J. Terranova
Executive Secretary

RJT/gb

CC: CVS

One CVS Drive

Woonsocket, Rhode Island 02895

Attn: Harvey Rosenthal, President

EDITORIAL OF *THE RECORD*,
DATED MAY 31, 1988

Drug store protection

It's hard to take issue with the independent neighborhood pharmacist. He answers all those questions about what to take for your backache. His store is open all hours of the night and weekend. He may even give you his home phone number in case you need a prescription filled in an emergency.

Despite all that, the state is wrong to try to protect the neighborhood pharmacist in his competition with the large drug store chains—just as it would be wrong to protect the small clothier over the large department stores. And now, the state Board of Pharmacy is embarking on an even more outrageous course. By a 6-1 vote, the board voted last week to ask the attorney general to appeal the court ruling that struck down this protectionism.

The protection worked this way. For years, the Board of Pharmacy, in a regulation aimed at the big chains,

barred the use of discounts, rebates or discount coupons for prescription drugs sold to people under the age of 62. (The exemption for senior citizens was added in 1973 by the legislature which apparently felt older residents deserved the lower prices.) The board, along with the neighborhood pharmacists, said the regulation was aimed at preventing customers from shopping at different drug stores for the best price. The customer, they said, benefited when a single pharmacist monitored all his prescriptions to make sure they didn't result in dangerous combinations.

Last month, an appellate court ruled the regulation illegal and scoffed at the board's reasoning. If the state was really interested in protecting consumers, why would it exempt the elderly, who deserve protection as much as anyone and may be more prone to confusion? The court said the state could not, through a pricing regula-

tion, direct consumers to specific pharmacies.

The pharmacy board is unpersuaded by the logic. Even more absurd, the board is now asking that taxpayer funds be used to appeal the court decision that would result in savings for the consumer. The attorney general should turn down the request.

Melvin Mack, the lone dissenter and a pharmacist from the small western New Jersey community of Voor-

hees, offered the best explanation. The move to appeal, he said, is based on economics, not concern for the public health. He also disputed the argument that the discounts will drive the independents out of business.

"The progressive 20th-century independent can compete with anyone," said Mr. Mack. He's right. What it takes is good business practice, not special regulation by the state.

EDITORIAL OF *THE RECORD*,
DATED AUGUST 17, 1989

No way to cut medical costs

In a perplexing decision, the New Jersey Supreme Court has reinstated a muddle-headed state law that bars discounts on prescription drugs, unless they're sold to elderly persons. The law combines the worst kind of government meddling in the marketplace with blatant protectionism for mom-and-pop pharmacies. In the bargain, the consumer gets stuck with higher prices.

The statute dates back to the Sixties. Its ostensible purpose was a good one. Sponsors said that discounts and rebates offered by the then-new chain drug stores encouraged consumers to shop for the best prices, switching from pharmacy to pharmacy to save money.

This drugstore-hopping made it impossible—so the argument went—for pharmacists to keep track of all the drugs their customers were taking and ensure that sure the customers weren't mixing incompatible medica-

tions, using prescriptions for too long, and so forth. That's a pharmacist's professional obligation, and it's easier to meet if the customer shops in just one drugstore. But pharmacists should ask what other drugs customers take every time they fill a prescription, even when the customer is a stranger. The customer-protection argument does not justify this bad legislation.

An underlying purpose of the statute was to insulate neighborhood drugstores from the competitive pressures of the big discount chains. Whatever the merits of small outlets vs. large ones, favoring one side or the other was not a proper purpose of government when the law was written, and it's not now.

The statute is also ludicrously selective. Discounts are outlawed except for customers who are 62 or older. One reason: The senior citizens enjoy the benefits of the state's generous Pharmaceutical Assistance to the Aged

program, which pays all but the first \$2 of prescription costs. The PAA program is so popular that it periodically threatens to break the bank. Thus, the state wants the lowest possible prices for the prescription bills it pays and welcomes discounts. At the same time, ironically, younger taxpayers who pay more of the cost of the PAA program are barred from taking advantage of the same discounts.

Finally, there is the spectacle of the state struggling to control rising medical costs with one hand and outlawing economical drug sales on the other. People with state-paid and employer-paid health insurance are constantly urged to be price-conscious in their decisions about doctors, hos-

pitals, and medical procedures. Yet the state slams the door on those who would shop for advantageous drug prices.

The no-discount law is indefensible. The court decision that reinstates it is bewildering. Consumer Value Stores (CVS), the Rhode Island-based chain that attacked the law in court, is weighing an appeal to the U.S. Supreme Court. Unless the Legislature can be persuaded to undo the mischief caused by its law in the Sixties—which seems doubtful—CVS should proceed with its appeal. In this case, it would be appropriate for the state Office of the Public Advocate and New Jersey's consumer organizations to join in.

National Council on Patient Information and Education,
Talk About Prescriptions Month (October, 1987) p.4

OLDER PEOPLE AND PRESCRIPTION DRUGS: SPECIAL NEEDS, SPECIAL PRECAUTIONS

Although the problem of medication misuse affects every U.S. population group, those at highest risk are older Americans. In part their special vulnerability relates to the large numbers of drugs they consume (see Fact Brief: Older People and Prescription Drug Use). It is common for older people to have several chronic diseases, with multiple drug regimens for each. Medications taken for acute conditions and over-the-counter drugs like aspirins, vitamins, and laxatives add to the potential for adverse drug interactions, side effects, and drug-induced illness. Lack of coordination among multiple providers of care further complicates the problem.

A variety of other factors, however, also account

for the serious extent of improper drug use among older consumers. For example, while inadequate patient-health care provider communication about prescription drugs is a problem for all Americans, it is a particular problem for older people. According to a U.S. Food and Drug Administration survey, one-third of the older population receives no drug use counseling from physicians or pharmacists, compared with one-quarter of those under 60. This appears to result in part from ageist attitudes of health care providers, who may stereotype older patients as hypochondriacal or childlike. But older patients contribute to the poor communication by being generally less willing to be assertive or "bother" the professional with complaints

they may inaccurately believe are inevitable with age. Good communication is further compromised by physical impairments, such as hearing loss or vision loss.

Poor communication does not just affect the ability of the patient to take drugs correctly. It also reduces the ability of the health professional to monitor and adjust therapy in an optimal way. For example, 52 percent of older people who don't fill a prescription never tell their physician; 43 percent of those who discontinue use never report it.

Physical changes also add to the problem of prescription drug misuse by older consumers. For many older people kidney and liver function decrease with age. Combined with decreased cardiac output, these changes can reduce the capacity for drug metabolism or elimination. Drug distribution in the body may be changed by the changing proportion of muscle to fat as the body ages. These and other changes can lead to greater drug sensitiv-

ity and exaggerated effects, although individual physical differences and the variety of drug combinations prescribed for different patients make it difficult to predict patient response.

In addition, the physical changes of aging can make it difficult even for well-motivated, knowledgeable patients to take their medicines correctly. For example, vision changes can make it hard to distinguish the colors of medications or their shapes; the instructions on the label may be impossible to read. Short-term memory loss may result in missed doses. Arthritis can make it hard to open childproof caps.

Social factors also contribute to medication misuse. Some older people lack the social support systems that could assist in medication-taking. Others, whose family or home care givers administer their medications, may receive incorrect doses or miss doses because the care giver does not understand the regimen.

NCPIE Campaign

To address communication-related problems, the National Council on Patient Information and Education has developed a media campaign to help improve prescription drug use among older people. The campaign, sponsored by The Retirement Research Foundation and The Commonwealth Fund, has three target audiences: older consumers, their family and friends, and the professionals who care for them. The focus is on effective patient-provider communication as a way to reduce medication misuse.

Based on focus group research with older consumers, the campaign materials feature nostalgic references to recapturing the close patient-doctor and patient-pharmacist relationship of "the good old days." The campaign theme, "Medicine: Before You Take It, Talk About It," encourages consumers to use the "oldest advance in medicine"—a good dialogue between patients and health care professionals.

Campaign materials, including radio and television public service announcements, print ads for consumers and health professionals, consumer and health professional brochures, and a counter card will be available for Talk About Prescriptions Month activities in October. See pages 8-9 for information on how to order materials and participate in the campaign in October and throughout 1988.

Special Precautions for Older Consumers

Health providers can help overcome medication misuse by taking special precautions in selecting drugs and monitoring use for their older patients. By asking the following questions, adapted from a checklist developed by a NCPIE member, the Up Front Drug Information Center in Miami, Florida, prescribers may help patients maximize the benefits of drug use and reduce the risks of noncompliance and adverse reactions.

Drug Selection

- Is there a documented need for the drug.
- Could presenting symptoms be the result of side effects from other drugs?
- Is there a better drug?
- Are there any contraindications or problems with other illnesses?
- Does the patient have impaired liver or kidney function?
- What is the smallest dose that will provide the desired effect?
- What other prescription and nonprescription drugs is the patient taking?
- Are all these drugs still needed?
- Is there an easy-to-administer form of the drug available?
- Is a once-a-day form available?
- Is the patient's nutritional status adequate?
- Are there other indications that food-drug interactions may be a problem?

